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IN THE

# Supreme Court of the United States

**OCTOBER TERM, 1969**

**No. 870**

ANTHONY DE LYRA,

*Petitioner,*

—v.—

UNITED STATES OF AMERICA

## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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November 21, 1969

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## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

The Petitioner, Anthony De Lyra, prays that a writ of certiorari issue to review the judgment and opinion entered on September 25th, 1969 by the United States Court of Appeals for the Second Circuit in the proceeding entitled United States of America, *Appellee,* v. Frank Crisona, Anthony De Lyra, John De Lyra and Frank Lloyd Parks, Defendant-Appellants.

### Opinions Below

The opinion of the Court of Appeals, not yet reported, appears in the Appendix hereto.

### Jurisdiction

The judgment of the Court of Appeals was entered on September 25, 1969. A timely petition for rehearing together with a suggestion that the rehearing be heard in banc, was denied

on October 24, 1969. The jurisdiction of this Court is invoked under Title 28 United States Code, Section 1254(1).

## Question Presented

1. Whether it is proper for the Circuit Court of Appeals in reviewing a determination of the District Court which refused the production of certain tape recordings to examine these recordings in camera and summarily determine that they would have no probative value to the defense.

## Statutory Provisions

Title 18, U. S. C. §371 provides in part:

> If two or more persons conspire either to commit any offense against the United States . . . and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000 or imprisoned not more than five years, or both.

Title 18, U. S. C. §1341 provides in part:

> Whoever, having devised or intending to devise any scheme . . . to defraud . . . for the purpose of executing such scheme . . . places in any post office or authorized depository for mail matter . . . any matter or thing . . . or knowingly causes to be mailed . . . any such matter or thing, shall be fined not more than $1,000 or imprisoned not more than five years, or both.

Title 18, U. S. C. §1343 provides in part:

> Whoever, having devised . . . any scheme or artifice to defraud or for obtaining money or property . . . by means of false or fraudulent pretenses, representations, or promises . . . transmits or causes to be transmitted by means of wire . . . communication in interstate or foreign commerce, any signs . . . signals . . . or sounds for the pur-

pose of executing such scheme or artifice, shall be fined not more than $1,000 or imprisoned not more than five years or both.

Title 18, U. S. C. §2314 provides in part:

> Whoever, having devised . . . any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations or promises . . . causes to be transported, or induces any person to travel in, or to be transported in interstate commerce in the execution or concealment of a scheme or artifice to defraud that person of money or property having a value of $5,000 or more, shall be fined not more than $10,000 or imprisoned not more than ten years, or both.

## Statement of the Case

The facts which underlie the question herein presented are that two Government witnesses, Richard Crake and John Martin Neiman, testified as to telephone conversations which were mechanically recorded by the witness Crake (R 95). One of these recorded conversations was played to the jury (R 114) and a transcript of this conversation was provided as a visual aid for the jury to follow the recording (R 108, 114). Trial counsel for the Petitioner demanded the Government to reproduce the additional conversations. There were "perhaps six or more" recordings made by Crake (R 170). The Government refused the production of the material demanded and the Court denied trial counsel's motions for its production. This denial was affirmed by the Circuit Court of Appeals, which after reviewing the tapes in camera held that although these tapes were statements under Rule 16(a) Federal Rules Criminal Procedure, they were irrelevant to the defense of the case and therefore properly withheld.

## Reasons for Granting the Writ

The decision below raises an important problem in the administration of Federal criminal justice. The net result of that decision has been to abridge rights of defendants, rights which the decisions of this Court have sought to protect.

### The Decision of the Court of Appeals on the Issue of Disclosing "Statements" of a Defendant is in Conflict with Recent Decisions of the United States Supreme Court

The Court of Appeals has decided that the trial court's failure to order the Government to turn over to Petitioner's trial counsel certain recorded statements made by one of the defendants, and in the Government's possession, was not reversible error because that Court had examined those recorded statements and had made the determination that "they contain no information which could reasonably have been additionally useful to the defense". (Slip opinion 16a) We respectfully submit that this finding is in error.

Petitioner, Anthony De Lyra, respectfully requests this Court to review the decision of the Court of Appeals in light of this Court's recent decision in *Alderman* v. *United States*, 394 U.S. 165, 89 S. Ct. 961 (1969). Although in that case the defendant's objective in requesting disclosure of recorded statements made by him differs from the case at bar, the underlying principle of the *Alderman* decision would clearly mandate a similar result in the instant case.

As previously stated, the Court of Appeals has determined that the trial court did not commit reversible error because the evidence it withheld from the defendant was not, in effect, relevant to the defense of the case. Mr. Justice White, in the

*Alderman* decision, spoke directly to this issue, i.e.: whether a Court may make such a determination, and the Court unequivocally held that such a determination is improper. In reaching that conclusion this Court was cognizent of the fact that "there may be much learned from an electronic surveillance which ultimately contributes nothing to probative evidence."

The decision of the Court of Appeals is diametrically opposed to the rule of law enunciated by Mr. Justice White in *Alderman*. The Petitioner vigorously questions that Court's ability to make a determination of relevancy. After examining the words of this Court, "An apparently innocent phase, a chance remark, a reference to what appears to be a neutral person or event . . .", can there be any questions as to the applicability of this principle to the case at bar where the credibility of a principal Government witness was so great an issue? As urged in his Brief on Appeal to the Court of Appeals, counsel had a right to inspect these statements with a view toward using them in cross-examination. It is interesting to note that this Court in *Alderman* apparently felt that the right of complete disclosure was so fundamental that it could not even be abridged where the national security was at stake—thus the option of "disclose or dismiss".

Both contemporaneous with and subsequent to the *Alderman* decision this Court has seen fit to order a rehearing or reexamination where a lower Court had summarily ruled that evidence was not material to the Petitioner's case where defense counsel was not given an opportunity to examine and inspect that evidence. *Gorman* v. *United States*, 394 U. S. 913, 89 S. Ct. 1177 (1969); and *Fannon* v. *United States*, 394 U. S. 454, 89 S. Ct. 1224 (1969).

The Petitioner, Anthony De Lyra, further questions the Court of Appeal's statement that "we are well aware that the usefulness of such statements should ordinarily be assessed by defense counsel rather than by us, and we expect that that will be the procedure in the future". (Slip opinion 16a) What basis is there for a prospective application? Petitioner respectfully submits that the *Alderman* rule is not a newly established standard for the Second Circuit, thereby prompting the issue of retroactivity. This rule was clearly established by the Supreme Court in March, 1969, more than six months before the Court of Appeals decision. It is, therefore, urged that this rule must be applied to the case at bar.

In order that this Court may remedy the Court of Appeal's misapplication of these critical principles of law it is respectfully urged that a review of the judgment below is required.

## CONCLUSION

**For these reasons a writ of certiorari should issue to review the judgment and opinion of the Second Circuit.**

Respectfully submitted

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New York, New York
*Counsel for Petitioner*

November 21st, 1969

# APPENDIX

## Opinion and Judgment of the Court of Appeals

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Nos. 624, 625, 626, 627—September Term, 1968.

(Argued May 23, 1969 Decided September 25, 1969.)

Docket Nos. 33130, 33131, 33132, 33133

UNITED STATES OF AMERICA,

*Appellee,*

—against—

FRANK CRISONA, ANTHONY DELYRA, JOHN DELYRA, and FRANK LLOYD PARKS,

*Defendants-Appellants.*

Before:

LUMBARD, *Chief Judge,*
FEINBERG, *Circuit Judge,* and TIMBERS, *District Judge.**

Appeals from convictions after a jury trial in the United States District Court for the Southern District of New York, Thomas F. Murphy, *J.*, for fraud and conspiracy to defraud in violation of 18 U.S.C. §§ 371, 1341, 1343, 2314. Affirmed.

MAURICE EDELBAUM, New York, N. Y., *for appellant Crisona.*

JAMES M. LA ROSSA, New York, N. Y., *for Appellant Anthony DeLyra.*

* Chief Judge of the District of Connecticut, sitting by designation.

JOSHUA N. KOPLOVITZ, New York, N. Y. (Koplovitz and Fabricant, on the brief), *for Appellant John DeLyra.*

EUGENE J. MORAN, New York, N. Y., *for Appellant Parks.*

JAMES D. ZIRIN, Assistant United States Attorney (Robert M. Morgenthau, United States Attorney for the Southern District of New York, Kevin J. McInerney, Elkan Abramowitz, Assistant United States Attorneys, on the brief), *for Appellee.*

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FEINBERG, *Circuit Judge*:

This appeal is from four judgments of conviction entered in the United States District Court for the Southern District of New York on December 11, 1968, after a four week trial before Thomas F. Murphy, *J.*, and a jury. Defendant Frank Crisona was found guilty on ten counts covering violation of the wire fraud statute, 18 U.S.C. § 1343, inducing interstate travel in execution of a fraud and interstate transportation of the proceeds of a fraud, 18 U.S.C. § 2314, and conspiracy, 18 U.S.C. § 371. Defendants Anthony and John DeLyra were found guilty on substantially similar counts and also on one count of mail fraud, 18 U.S.C. § 1341. Frank Lloyd Parks was convicted of a total of seven counts for wire and mail fraud, interstate travel in execution of a fraud, and conspiracy. The first three defendants were each sentenced to three years, and Parks to one year, imprisonment on all counts to run concurrently.

Prior to trial two other defendants, Dominic C. Lonardo and John Martin Neiman, pleaded guilty to one and 17 counts, respectively, and subsequently Neiman testified as a government witness.

## I. The Conspiracy

The indictment charged all four appellants, Neiman and Lonardo with conspiring to defraud and actually defrauding many individuals and corporations. While only Parks challenges the sufficiency of the voluminous evidence developed at trial, a summary of the numerous and complex financial dealings which underlie appellants' convictions is helpful in considering the various legal issues raised. The evidence introduced by the Government allowed a jury to find the following.

Crisona, a former Assistant District Attorney for Queens County, New York, first met Neiman, whom the Government aptly describes as a "professional confidence man with a long criminal record," in October 1964, when they engaged in a joint attempt to salvage financially a summer camp in which Crisona had an interest. The attempt failed, and the camp was lost, leaving Crisona $15,000 in debt to a loan shark, but the business association between the two men survived. In the summer of the following year, Neiman entered into negotiations with one William Sikora, a New Jersey real estate operator, to provide Sikora with a commitment for a $3,000,000 loan, and persuaded him to pay a security deposit of $10,000 in the form of a check made out to Crisona, as attorney, to be held in escrow pending the funding of the loan. Crisona promptly cashed the check and split up the proceeds between himself, Neiman and Crisona's loan shark. Ap-

parently during this period Crisona first met Anthony DeLyra, with whom Neiman had done business in the past, and Parks, a former stockbroker who used an office in the same building as John DeLyra. Anthony was introduced to Sikora as an individual who would advance sums for the latter's loan and Parks was presented to him as the stockbroker who was going to handle the financing. Evidently no loan was ever consummated.

In October 1965, Neiman and the DeLyras somehow came into possession of a stolen $9,200 cashier's check payable to a recently deceased woman named Mary McCarthy. Pursuant to Crisona's suggestion a joint checking account in the names of Mary McCarthy and a fictitious John O'Brien was opened in a branch of the Franklin National Bank and the check deposited in it. Within the next few days Crisona signed two checks in the name of John O'Brien for $5,600 and $3,500 and he and Neiman then cashed them at the bank and divided up the proceeds among themselves and the two DeLyras. The bank, however, discovered that Mary McCarthy was dead. The check was dishonored, and Crisona was notified that he would be held responsible for the $9,100 overdraft.

In November 1965, Neiman, Crisona and the DeLyras, who were apparently all in debt, and Parks, who was unemployed, devised their basic scheme of utilizing a foreign corporation owned by John DeLyra, Columbia Resources, Ltd., to issue real estate financing commitments. To make the corporation appear financially sound, they prepared a false financial statement showing a net worth of $11,000,000,[1] which was submitted to Dun and Bradstreet as

[1] This was later altered to show even greater worth.

a basis for a credit rating, along with false resumes of the backgrounds of four officers of Columbia, two of whom were pseudonyms for Neiman and Anthony DeLyra. Utilizing this false statement, and the excellent Dun and Bradstreet rating they eventually received, and variously presenting themselves as officers of the corporation, often under assumed names, the defendants thereafter used Columbia Resources as a front for obtaining advance fees from various individuals and corporations in return for letters of intent or commitments to secure real estate financing. In most instances the advance was presumably to be held in escrow by Crisona, as attorney, pending the funding of the loan, but was in fact immediately distributed among Neiman and the defendants. None of the Columbia loan financings was ever consummated.

The specific transactions of this nature which form the basis of the various counts on which appellants were indicted may be outlined briefly, as they all follow substantially the same pattern.

(1) *Kline.* In November 1965, Neiman was referred to a Boston real estate developer, Sydney Kline, to whom he sent a copy of the false financial statement and offered a commitment for a $700,000 first mortgage to finance a nursing home which Kline planned to construct. A man named Graeber, acting for Neiman, went to Boston and attempted to secure a two per cent standby fee or deposit from Kline in return for a commitment letter. At Graeber's suggestion Kline spoke on the telephone to Crisona, who assured him that Columbia was a reputable firm which he had often represented and that Kline's check for the advance fee would be held in escrow pending completion of the transac-

tion. Kline then wrote out a check for $13,500 to Crisona which Crisona, when he received it, promptly cashed and distributed among his colleagues.

In late December, a second commitment of $125,000 for another nursing home was arranged with Kline after a purported appraisal of the property by John DeLyra, under a false name, who elicited another standby fee check for $2,500 which was again supposed to be held in escrow. When Kline became suspicious of the lack of progress in the financing he called Crisona and asked for his money back, but was told that it had been turned over to Columbia.

(2) *Sunrise Mountain Corp.* In December 1965, Neiman made contact with A. Earle Brown, the owner of Sunrise Mountain, a development corporation which was in Chapter XI reorganization; Brown was seeking a $3,000,000 loan for a real estate project in Las Vegas. At initial meetings between Brown, Neiman—under an assumed name—and Crisona, it was agreed that Sunrise would pay a $30,000 standby fee to Columbia for a $3,000,000 loan commitment. Crisona assured Brown of the corporation's reliability and its ability, based on the false financial statement, to fund the loan. Subsequently, Brown and his attorney, Richard Crake, met with Crisona, Neiman and Parks, who was introduced as a Columbia officer who acted as a West Coast liaison man. Crisona again made assurances of his own and Columbia's respectability and it was agreed that out of the standby payment Crisona would receive a $7,500 attorney's fee with the balance being placed in escrow. As the date when the funding was scheduled drew near, however, Crisona persuaded Brown and Crake, who was co-escrowee with Crisona,

to release the escrow fund, finally assuring them that the closing of the funding would take place the same day. Crisona immediately deposited the escrow check and distributed the proceeds, using a portion of them to pay off the overdraft caused by the McCarthy-O'Brien transaction. He never showed up for the closing, which continued to be repeatedly postponed with a variety of excuses. During January 1966, Crake had a number of telephone conversations with Neiman, Crisona, and Parks, at least some of which he tape recorded. On January 19, Crake and Brown finally went to the office of the United States Attorney for the Eastern District of New York and requested an investigation of Columbia.

(3) *Tuller.* At approximately the same time, Neiman and Anthony DeLyra, again using false names, obtained a check for $8,500, in return for a letter of intent to obtain a $850,000 loan for a Julliard Tullar of Silver Springs, Maryland. As usual, the closing of the loan was repeatedly delayed and as a result, the mortgage on Tuller's property was foreclosed at a loss of $300,000.

(4) *Menlove.* In February 1966, Parks and Neiman persuaded Roy Menlove, a Salt Lake City motel owner, to put up an advance fee of $11,000 for a prospective $1,100,000 loan by Columbia, after Parks had conducted an "appraisal" of Menlove's property and Menlove had been furnished a copy of the Dun and Bradstreet report based on the false financial statement on Columbia. The loan closing was twice adjourned and never took place.

(5) *Fazio.* In return for a letter of intent to provide a $1,500,000 loan for a motel, a Mr. Fazio in Cleveland gave Neiman a check for $11,500 on account. The loan was not funded.

(6) *Howard Rome.* In April 1966, after negotiations between Neiman, Parks, John DeLyra, Crisona and a Howard Rome in Cleveland, it was agreed to arrange a $1,350,000 loan for Rome with a $13,500 advance fee. Once again these negotiations involved an "appraisal" by Parks, false financial information, aliases and a variety of lies about the identity and experience of purported Columbia Resources executives. Crisona dissuaded Rome from putting the advance in escrow and it was divided among various participants.

(7) *Indianapolis.* In July 1966, Neiman and John DeLyra persuaded Morris Mitchell and Ary Infante, Indianapolis businessmen, to advertise that their company had funds available for loans and to refer prospective customers to Columbia in return for 25 per cent of advance fees collected. Over the following weeks Neiman and the two DeLyras collected a total of $19,000 in advance fees from customers so recruited.

Defendant Crisona testified in his own behalf that he had acted exclusively as a lawyer in the transactions with which he was involved, that in effect he was innocently misled by Neiman and that he never intended to defraud anyone or knowingly made any false representations. By its verdict the jury clearly discredited this testimony. Defendant Parks testified that he was unaware of the fraudulent nature of the enterprises and that the appraisals he conducted were done in good faith. Neither of the DeLyras took the witness stand.

On appeal, defendants jointly and separately raise a number of claims of error in the proceedings below. In addition, appellant Parks attacks the sufficiency of the evidence against

him. We will discuss these various arguments in turn; as will be seen, we find none of them persuasive.

II. Failure to Turn Over Tape Recordings

Crisona's main argument on appeal, adopted by all of the other defendants insofar as applicable to them, relates to the district court's refusal to order the Government to turn over to the defense tape recordings made by Crake, the lawyer in the Sunrise Mountain Corporation transaction, of various telephone conversations. Crake testified about one such conversation, held on January 18, 1966, in which Crisona told Crake that the $7,500 advance fee had been turned over to Columbia Resources, reassured him that the corporation was "legitimate," and described to him some of the other successful "deals" by Columbia on which Crisona had worked. Toward the end of Crake's direct testimony, he identified a tape, which was subsequently received in evidence and played to the jury, as a recording of this January 18 telephone conversation. Crake also recorded a number of other telephone conversations including several with Crisona and Neiman and Parks. Crake turned these tapes over to the F.B.I., but none was introduced at trial except for the one of the January 18 conversation. At trial, defense counsel called for the production of all of the tapes, basing their request alternatively on 18 U.S.C. §3500, Rule 16 of the Federal Rules of Criminal Procedure, and the doctrine of *Brady* v. *Maryland*, 373 U.S. 83 (1963). The trial judge denied disclosure of the tapes on all three grounds, and all are raised here on appeal. Defense counsel also asked the judge to listen to the tapes himself or to mark and seal them as

a court exhibit for appellate review, but he declined both suggestions.

1. *Section 3500*

Appellants' first argument is that the tapes should have been turned over to the defense under the provisions of the Jencks Act, 18 U.S.C. §3500:

> (a) In any criminal prosecution brought by the United States, no statement or report in the possession of the United States which was made by a Government witness . . . to an agent of the Government shall be the subject of subpena, discovery, or inspection until said witness has testified on direct examination in the trial of the case.
>
> (b) After a witness called by the United States has testified on direct examination, the court shall, on motion of the defendant, order the United States to produce any statement (as hereinafter defined) of the witness in the possession of the United States which relates to the subject matter as to which the witness has testified.

Under subsection (e) the term "statement" as used in subsection (b) is defined as:

> (1) a written statement made by said witness and signed or otherwise adopted or approved by him; or
>
> (2) a stenographic, mechanical, electrical, or other recording, or a transcription thereof, which is a substantially verbatim recital of an oral statement made by said witness to an agent of the Government and recorded contemporaneously with the making of such oral statement.

The court below declined to order the tapes turned over to defense counsel under section 3500. The apparent ground

for the ruling was that Crake had not testified about any recorded conversation other than the one on January 18—the transcript and tape of which were turned over since the Government introduced them into evidence—and there was no showing that the remaining tapes related to the subject matter of the direct testimony. We need not consider the correctness of this restrictive interpretation of section 3500(b), see *United States* v. *Birnbaum*, 337 F. 2d 490, 497-98 (2d Cir. 1964), since we find that the tapes were not "statements" within the meaning of the Jencks Act. The tapes of these telephone conversations do not come within subsection (e)(2) as they are not recordings of oral statements made to a government agent. Nor, as appellant Anthony DeLyra contends, are the recordings and the transcripts made from them "in effect" a written statement under subsection (e)(1).

Our decision in *United States* v. *Birnbaum, supra,* is not inconsistent with this analysis. There we upheld the refusal of the trial judge to turn over to the defense tape recordings of two conversations between the defendant, indicated for bribing an Internal Revenue agent, and a government witness. While we noted that "[t]here is no dispute that the transcripts [of the recorded conversations] are 'statements' within the meaning of subsection (e) of the Act," 337 F. 2d at 497, that dictum was based on circumstances in which the recordings were made at the direction of the F.B.I. with the specific objective "to garner evidence of appellant's complicity in the bribery scheme." *Id.* at 498. In the factual situation there present the statements of witnesses might reasonably be construed as being made "to an agent of the Government." Indeed, there is

authority for interpreting the Jencks Act not to apply at all to the sort of pre-investigatory communications involved in this case. Thus, the Seventh Circuit, upholding a refusal to turn over to the defense a contemporaneous tape recording of a conversation between the payer and the recipient of a bribe—witness and defendant, respectively—in a subsequent prosecution for extortion, has defined Jencks Act material succinctly:

> A § 3500 statement is a recorded recital of past occurrences made by a prospective prosecution witness. From its very nature, necessarily it is made after those events have taken place.

*United States* v. *Sopher*, 362 F. 2d 523, 525 (7th Cir.), cert. denied, 385 U.S. 928 (1966). Cf. *Battaglia* v. *United States*, 349 F. 2d 556, 560 (9th Cir.), cert. denied, 382 U.S. 955 (1965). We need not now decide whether we would similarly limit the scope of material obtainable under the Act in an appropriate case, although our dictum in *Birnbaum* clearly looks the other way. It is sufficient for the purposes of this appeal that the telephone conversations of witness Crake were in no sense "to an agent of the Government."[2]

---

[2] The record indicates that at one point during the trial counsel for defendant Parks speculated that Crake, since he had been to see the United States Attorney in Brooklyn, might have been acting at the latter's direction in taping the conversations and thus "as an agent" of the Government. The trial judge suggested that counsel could readily ascertain that fact by asking either that government attorney or Crake. Counsel did not pursue the matter further on the record. In any event, it is clear that Crake began taping the conversations before he visited the United States Attorney and there is nothing in the record to indicate that he continued to do so by virtue of governmental instructions.

2. *Rule 16(a)*

Appellants next contend that the tapes or transcripts should have been produced under Fed. R. Crim. P. 16(a):

> Upon motion of a defendant the court may order the attorney for the government to permit the defendant to inspect and copy or photograph any relevant (1) written or recorded statements or confessions made by the defendant, or copies thereof, within the possession, custody or control of the government, the existence of which is known, or by the exercise of due diligence may become known to the attorney for the government . . . .

The trial judge denied such a request on the theory that the section does not cover statements made by a defendant prior to arrest.[3] On appeal the Government vigorously defends that ruling, contending that "statements or confessions" under Rule 16(a) do not include pre-arrest statements made by a defendant during the course of the commission of a crime. The question has divided trial judges; the authorities were collected most recently by Judge Frankel in the Southern District of New York in a thorough opinion. *United States* v. *Rosenberg*, 299 F. Supp. 1241 (S.D.N.Y. 1969). While noting that the judges of that district had reached different conclusions on the subject, he concluded that tape recordings taken of conversations in which the defendant allegedly offered an Internal Revenue agent bribes were clearly "state-

[3] Before the trial, Judge Mansfield denied a similar Rule 16(a) motion by Anthony and John DeLyra on the ground that a recording made at the time of an offense is not a statement under 16(a). *United States* v. *Crisona*, 271 F. Supp. 150, 157 and n. 15 (S.D.N.Y. 1967), modified in unpublished memorandum, Jan. 10, 1968.

ments" under Rule 16(a) and discoverable by defendant. For similar district court rulings, see, e.g., *United States* v. *Lubomski*, 277 F. Supp. 713, 719-22 (N.D. Ill. 1967); *United States* v. *Iovinelli*, 276 F. Supp. 629, 630-31 (N.D. Ill. 1967); *United States* v. *Leighton*, 265 F. Supp. 27, 34 (S.D.N.Y. 1967); cf. *United States* v. *Baker*, 262 F. Supp. 657, 671-72 (D. D.C. 1966). The bases of these decisions have been that the language of amended Rule 16(a) is unqualified in contrast to the limited definition of "statement" in section 3500, that the Notes of the Advisory Committee indicate that the amended Rule was intended to apply even to pre-arrest statements made by a defendant during the course of his crime and was meant to broaden materially the scope of discovery available to a defendant,[4] that such a statement is obviously of such vital importance to the defense that fairness compels its disclosure, and that guilty pleas will thereby be encouraged. This broad interpretation of "statement" in Rule 16(a) is supported by the recent recommendation of the ABA Project on Minimum Standards for Criminal Justice, Standards Relating to Discovery and Procedure Before Trial 62 (1969) that a defendant receive before trial all of his statements

> regardless of to whom they were made—whether a prosecuting attorney, an investigator, a grand jury . . . , or anyone else. It is also intended that statements be discoverable regardless of how they are obtained, whether surreptitiously or voluntarily.

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[4] In amending the Rule in 1966, the Advisory Committee noted that:

> The defendant is not required to designate because he may not always be aware that his statements or confessions are being recorded. . . . Discovery of statements and confessions is in line with what the Supreme Court has described as the "better practice" (Cicenia v. LaGay, 357 U.S. 504, 511 (1958)) . . . .

We agree with these conclusions and see nothing in the plain language of Rule 16(a) or the Notes of the Advisory Committee accompanying it which would justify imposing the limitation suggested by the Government. See *United States* v. *Knohl,* 379 F.2d 427, 441-42 (2d Cir.), cert. denied, 389 U.S. 973 (1967) (dictum).

Having concluded that the tapes of defendants' conversations are "statements" under Rule 16(a), we must still decide whether failure to turn them over was reversible error. The Government points out that the language of the section is not mandatory—"the court *may* order the attorney for the government" (emphasis added)—and indeed this has been the focus of another dispute in the district courts over what showing of need, if any, a defendant must make in the ordinary case to compel inspection of his statement. E.g., compare *United States* v. *Projansky,* 44 F.R.D. 550 (S.D.N.Y. 1968), with *United States* v. *Louis Carreau, Inc.,* 42 F.R.D. 408 (S.D.N.Y. 1967). We note that weighty scholarly authority supports the proposition that withholding a defendant's statement should be the exception, not the rule, subject to the court's power to impose a protective order when appropriate. See ABA Project on Minimum Standards for Criminal Justice, Standards Relating to Discovery and Procedure Before Trial 52-53, 58-61 (1969); 8 Moore, Federal Practice ¶16.05[1] (2d ed. 1969). However, we need not discuss that issue more fully because the trial judge here ruled as a matter of law—not of discretion—that the tapes did not qualify as statements.

On the facts of the present case, however, we hold that the trial judge's failure to compel disclosure of the tape

recordings under Rule 16(a) was not reversible error. Aside from the one recorded conversation to which Crake testified and which was played to the jury, a transcript of which was furnished the defense, none of the others was introduced in evidence. While none of the latter tapes was otherwise made available to the defendants, we have closely examined the transcripts[5] of the tapes and find that they contain no information which could reasonably have been additionally useful to the defense. Moreover, we note that the cumulative evidence of defendants' guilt adduced at trial was very substantial indeed. In sum, while the tape recordings of conversations of defendants were "statements" under Rule 16(a), we find that the court's failure to make them available was not in fact harmful.[6] Cf. *Rosenberg* v. *United States*, 360 U.S. 367 (1959); *United States* v. *Annunziato*, 293 F. 2d 373, 381-82 (2d Cir.), cert. denied, 368 U.S. 919 (1961). We are well aware that the usefulness of such statements should ordinarily be assessed by defense counsel rather than by us, and we expect that that will be the procedure in the future. In any event, we will apply the interpretation of Rule 16(a) that we adopt here to all motions made thereunder after this opinion is filed.

---

[5] These have been furnished to us by the Government, and we are lodging them with the Clerk of the Court in a sealed envelope pending further review, if any, of the case.

[6] We put to one side the fact that counsel for Parks did not specifically request the tapes at trial. We note that it was not clear at trial that conversations with Parks had been recorded; that information is disclosed by the transcripts of the tapes.

3. *Brady* v. *Maryland*

The third ground of alleged error involving the tapes is based on the doctrine of *Brady* v. *Maryland,* 373 U.S. 83 (1963), under which the prosecution is required to turn over to the defense any material evidence in its possession which is favorable to the accused. Although the prosecution below represented to the trial judge that there was no exculpatory or contradictory information in the tapes, defendants maintained that the trial judge should himself listen to the tapes in order to determine whether the defense was entitled to obtain them in the interest of justice. The trial judge declined to do so, and appellants argue that a government prosecutor cannot be expected to be able to make a meaningful evaluation of what material may be useful to defense counsel and that, at the least, possibly useful material should be objectively reviewed by the trial judge. We realize that the problem is a real one which has been the subject of substantial discussion. See, e.g., ABA Project on Minimum Standards for Criminal Justice, Standards Relating to Discovery and Procedure Before Trial 73-78 (1969); Note, The Prosecutor's Constitutional Duty to Reveal Evidence to the Defendant, 74 Yale L.J. 136, 147-49 (1964). However, appellants themselves concede the lack of any precedent for such a procedure, and indeed, this court has very recently restated the present legal principle that, with certain limited exceptions not here applicable, "the assurance by the government that it has in its possession no undisclosed evidence that would tend to exculpate defendant justifies the denial of a motion for inspection that does not make some particularized showing

of materiality and usefulness." *United States* v. *Evanchik*, F. 2d , (2d Cir. July 16, 1969). The request here was for a known item—tapes of conversations to which one or more defendants were parties; the record below discloses no such particularized showing of need; and as we have already noted, we have examined the transcript of the tapes and found it to contain nothing that would have been additionally useful to the defense.

### III. The McCarthy-O'Brien Transaction

Appellants' next argument is that evidence about the fraudulent bank account established with the check of the deceased Mary McCarthy, introduced over their objections, should have been excluded because its probative value was far outweighed by its prejudicial effect. In addition, they object to the Government's introduction of false grand jury testimony by Crisona relating to the transaction and cross-examination in which Crisona repeatedly contradicted that testimony. The Government contends, on the other hand, that the check episode was admissible to show motive for appellants' subsequent conduct, i.e., proceeds from the Sunrise Mountain Corporation fraud were needed and used to pay off the $9,100 overdraft created when the McCarthy check was stopped. Secondly, the Government justifies the introduction of the transaction and Crisona's grand jury testimony about it as relevant to Crisona's credibility.

It has been this court's "consistently held position that evidence of similar acts, including other crimes, is admissible for any relevant purpose other than merely to show defendant's bad character." *United States* v. *Johnson*,

382 F. 2d 280, 281 (2d Cir. 1967). We do not think that the substantial and pressing financial obligation arising from the transaction is of insignificant probative value on the issue of appellants' motivation for their subsequent frauds. Cf. *United States* v. *Kahaner,* 317 F. 2d 459, 470-72 (2d Cir.), cert. denied, 375 U.S. 836 (1963). Nor are we impressed by the magnitude of the prejudicial impact of what appellant Crisona terms "the repulsive tale as to the theft of the dead woman's check" in the context of appellants' numerous other financial misappropriations. Cf. *United States* v. *Bradwell,* 388 F. 2d 619, 622 (2d Cir.), cert. denied, 393 U.S. 867 (1968); *United States* v. *Jordan,* 399 F. 2d 610, 612-13 (2d Cir.), cert. denied, 393 U.S. 1005 (1968). Moreover, it was the defendants themselves who, on cross-examination of government witness Neiman, brought out the "repulsive" aspects of the affair—that the check was stolen and that Mary McCarthy was dead. Finally, the trial judge took pains in his instructions to the jury to limit the effect of the evidence. Appellants rely heavily on the decision of this court in *United States* v. *Byrd,* 352 F. 2d 570 (2d Cir. 1965). But we have made clear that *Byrd* itself only "reiterated that where the pertinent factors have been duly considered, the admissibility of the evidence is a matter in which the trial judge should be allowed a wide range of discretion." *United States* v. *Deaton,* 381 F. 2d 114, 118 n. 3 (2d Cir. 1967). Assessing the "pertinent factors" here involved, we do not think that the trial judge abused his discretion.

## IV. Failure to Rule in Advance on Defendants' Convictions

Appellant John DeLyra contends that the trial judge erred in refusing to make an advance ruling with regard to the admissibility for impeachment purposes of certain prior convictions. During a recess on a Friday near the end of the Government's case, the attorney for both John and Anthony DeLyra informed the judge that he was "contemplating the possibility" that either or both would testify but that he understood that both had been convicted of crimes 25 or more years before; he requested the court to rule whether it would allow the Government to bring out the convictions if the defendants were to testify. The following Monday the trial judge declined to make such an advance ruling. On appeal, we are told that John DeLyra had been convicted of vagrancy and of petit larceny in 1935, and that between 1937 and 1940 he was charged with concealment of leased property, for which he was ultimately fined $300.[7] Appellant, relying largely on this court's decision in *United States* v. *Palumbo*, 401 F. 2d 270 (2d Cir. 1968), cert. denied, 394 U.S. 947 (1969), argues that these ancient and relatively minor convictions should not have been available to the Government to impeach his credibility and that the trial judge had discretion to prevent such use and should have so ruled before appellant decided whether to take the stand.

It is true that *Palumbo* stands for the proposition that a trial judge has discretion to exclude evidence of prior crimes in an appropriate case and to decide to do so in advance of defendant's testifying. However, while such a practice may

[7] Anthony DeLyra apparently does not press this claim of error on appeal; in any event, our disposition of it would be the same.

sometimes be desirable, *Palumbo* does not suggest, as appellant would have us rule, that it is necessarily error for the judge to defer exercising that discretion until the defendant has in fact testified. Indeed, in *Palumbo* itself, we stressed that the trial judge has discretion in this area, see 401 F. 2d at 274, and we have subsequently approved a district court's discretionary refusal to make advisory rulings in similar circumstances. See *United States* v. *Evanchik*, —— F. 2d —— (2d Cir. July 16, 1969); *United States* v. *Hart*, 407 F. 2d 1087, 1088-89 (2d Cir. 1969). Under these circumstances, we hold that there was no abuse of discretion in the trial judge's failure to make an anticipatory ruling.

## V. Objections to Jury Instructions

### 1. *Charge on intent*

Appellant Anthony DeLyra contends that the trial judge, in instructing the jury, failed to make clear that the element of criminal intent must have been proved as to each of the charges beyond a reasonable doubt. In charging on the many different counts, the judge repeatedly included intent or knowledge as one of the elements which the Government had to establish beyond a reasonable doubt as to each offense. Immediately after the charge, defense counsel took exception to the court's failure specifically to instruct the jury on the elements of wilfulness and knowledge. Consequently, the judge then gave the supplemental charge:

> Ladies and gentlemen, I am told that in my charge in explaining the counts . . . that I called the wire crimes and travel crimes and the transport-money-by-fraud crimes, I neglected to tell you one of the elements that the government must prove with regard to each

> defendant accused in those crimes is that he did the act complained of knowingly and wilfully; and that means that he had to have an evil intent at the time of the alleged crime; not something that he did negligently or accidentally but purposefully. In other words, he had a criminal intent when he is alleged to have committed these crimes.

Appellant apparently argues that the court should have again stated that this element of the crime had to be proved beyond a reasonable doubt. In view of the judge's prior instructions, this was unnecessary. Indeed, defendants made no further objection. Cf. *United States* v. *Indiviglio*, 352 F. 2d 276 (2d Cir. 1965) (*en banc*), cert. denied, 383 U.S. 907 (1966).

2. *Missing witness charge*

Appellant John DeLyra raises as error the trial judge's instruction on missing witnesses. In his summation counsel for Crisona several times called attention to the failure of the Government to summon certain individuals as witnesses; in reply, the prosecuting attorney noted that the defense could have obtained the presence of witnesses by subpoena. In his jury charge, the trial judge commented:

> During summations there was considerable reference to where a certain witness was and to the fact that he wasn't called. In a federal criminal trial both the government and a defendant are entitled to receive from the clerk of the court a subpoena calling for the attendance of a witness, and no matter where the witness lives in the United States, he is required to appear when served with such a subpoena.
>
> Now, X or Y or Z could have been called by either side as a witness, so that from the failure of either

> side to call him or them you may infer that his or their testimony might have been unfavorable to either the government or to a defendant, but it is equally within your discretion to draw no inference at all from the failure of the government or a defendant to call X or Y or Z.

Appellant argues that allowing the jury to draw an unfavorable inference from his failure to call a witness infringes upon his right to rest upon the Government's burden of proof. But we have long held that it is proper to instruct the jury that "the failure to produce such a witness is open to an inference against either party." *United States* v. *Dibrizzi*, 393 F. 2d 642, 646 (2d Cir. 1968); see *United States* v. *Armone*, 363 F. 2d 385, 404-05 (2d Cir.), cert. denied, 385 U.S. 957 (1966); *United States* v. *Evanchik*, *supra*, F. 2d at . Additionally, appellant argues that this charge is only permissible where the witness is "equally available" to both sides, that the power to subpoena does not establish "equal availability," and that in fact the witnesses referred to were not "as a practical matter" available to the defendant. We noted in *United States* v. *Armone*, *supra*, 363 F. 2d at 405, that "[i]f the court had stated that a witness was available who was not, in fact, available, a different picture might have been presented," but defendant made no assertion either below or here on appeal that any specific individual was unavailable to him. Indeed, no exception whatever was taken to the charge, which is sufficient in itself to be dispositive. See *United States* v. *Indiviglio*, *supra*. In sum, we find no merit in appellants' objection to the charge.

VI. Improper Juror Discussions

Shortly before the charge, counsel for the DeLyras represented to the judge that there had been improper discussions among the jurors. Rose DeLyra, sister-in-law of the DeLyras, then testified that a few days before she had heard three female jurors discussing the case in the ladies' room and that one of them had said "He's guilty," and another, "If you ask me they're all guilty." Mrs. DeLyra said she could identify with certainty only one of the women and was uncertain who had said what. Counsel for the DeLyras requested an inquiry of the jurors and the trial judge agreed that he would conduct one. Subsequently the judge did confer *in camera* with each of the four female jurors and a female alternate juror, and stated that he was satisfied that there was no basis in fact for Mrs. DeLyra's testimony. On appeal, John DeLyra claims that the judge should have conducted a hearing in open court on the matter with defense counsel present. However, there is no indication that any defense counsel ever requested such a hearing, objected to the judge's course of action, or even took exception to his conclusion. Consequently there is no merit to appellant's contention. See *United States* v. *Kahaner*, 317 F. 2d 459, 482-83 (2d Cir.), cert. denied, 375 U.S. 836 (1963). Moreover, the procedure adopted by the judge seems to have been reasonable under the circumstances. See *Miller* v. *United States*, 403 F. 2d 77, 81-82 (2d Cir. 1968); cf. *United States* v. *Woodner*, 317 F. 2d 649, 651-52 (2d Cir.), cert. denied, 375 U.S. 903 (1963).

## VII. Sufficiency of the Evidence Against Parks

The main argument of appellant Parks is that the evidence against him was insufficient to support his conviction, and that there was no showing that he knowingly participated in the illegal schemes or had any motive for such a participation. Taking the evidence, as we must, from the view most favorable to the Government, we find sufficient grounds on which the jury could reasonably have reached its conclusion as to appellant's guilt. To summarize the most important facts: Parks was present at meetings among the conspirators at which the details of the scheme were planned and carried out; he received substantial shares of the proceeds of fraudulently obtained advance fees; he presented himself, or was presented, to various victims under aliases and in false capacities and made a variety of misrepresentations to these victims about Columbia Resources. In the light of his intimate and prolonged connection with the other defendants and their illegal enterprise it is not surprising that the jury found unpersuasive his assertion that he was merely an innocent dupe.

Parks raises a second claim of error relating to an allegedly prejudicial line of questioning by the trial judge about certain written appraisal records, but we find it wholly without merit.

Judgments affirmed.

# In the Supreme Court of the United States

OCTOBER TERM, 1969

No. 870

ANTHONY DE LYRA, PETITIONER

*v.*

UNITED STATES OF AMERICA

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT*

## BRIEF FOR THE UNITED STATES IN OPPOSITION

### OPINION BELOW

The opinion of the court of appeals (Pet. App.) is not yet reported.

### JURISDICTION

The judgment of the court of appeals was entered on September 25, 1969. A petition for rehearing was denied on October 24, 1969. The petition for a writ of certiorari was filed on November 21, 1969. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).



373-267—70

## QUESTION PRESENTED

Whether, after determining that the District Court should have required disclosure of certain recordings of conversations with co-defendants made by a lawyer for one victim of the fraud, the court of appeals properly concluded after an *in camera* examination that the non-disclosure was harmless error.

## RULE INVOLVED

Rule 16(a), F.R.Crim.P., provides:

> (a) *Defendant's Statements; Reports of Examinations and Tests; Defendant's Grand Jury Testimony.* Upon motion of a defendant the court may order the attorney for the government to permit the defendant to inspect and copy or photograph any relevant (1) written or recorded statements or confessions made by the defendant, or copies thereof, within the possession, custody or control of the government, the existence of which is known, or by the exercise of due diligence may become known, to the attorney for the government * * *.

## STATEMENT

After a jury trial in the United States District Court for the Southern District of New York, petitioner was convicted on thirteen counts charging violations of various federal fraud statutes and conspiracy. On December 11, 1968, he was sentenced to imprisonment for concurrent terms of three years. The court of appeals affirmed (Pet. App. 1a–25a).

1. The evidence showed that in November 1965,

after several unsuccessful attempts to raise money to pay various business debts, petitioner and four co-defendants (John De Lyra, Frank Parks, Frank Crisona, and John Martin Neiman)[1] entered into a scheme to defraud, using a corporate shell owned by John De Lyra, Colombia Resources Ltd. (hereafter referred to as "Colombia"), whereby they would secure advance fees for promises to provide real estate financing to individuals and corporations seeking funds (Tr. 1147–1150, 1158–1159).[2] To give Colombia an appearance of financial substance, a fraudulent balance sheet listing non-existent assets was drawn up by the conspirators under the name of a fictitious certified public accountant (Tr. 1161–1165, 1150–1151). This false financial statement, along with a listing of Colombia's officers[3] (Tr. 1162A–1165) was submitted to Dun & Bradstreet for a favorable credit rating (1165–1166). Upon receiving such a rating, petitioner and his codefendants embarked on a scheme to secure advance fees in return for letters of intent or commitments to secure financing. Generally, the advance fees were placed in an escrow account of one of the defendants, Frank Crisona, an attorney. The money was withdrawn immediately, however, and divided among the defendants for their own personal

[1] John Martin Neiman pleaded guilty to the charges against him and testified as a government witness at trial.

[2] We are lodging with the Clerk of this Court the pertinent transcripts of the trial.

[3] A fictitious person, Don Alfredo del Bustilla, was listed as the president. The other officers were: John Neiman, listed as "S. P. Williams"; petitioner, listed as "Jack Kramer"; and Arthur Graeber, listed as "Mr. Wachstatter."

use. Colombia never obtained any financing for its clients (see Pet. App. 4a–5a).

2. The transaction which gave rise to the question presented here is typical of the seven other fraudulent schemes involved in this case. In December 1965, John Martin Neiman, using the assumed name, "S. P. Williams," contacted A. Earle Brown, the owner of Sunrise Mountain Corporation,[4] concerning a three million dollar loan which Brown was attempting to secure (Tr. 1196–1197, 32, 281–282, 288). Brown agreed with Neiman and Crisona to pay $30,000 as a standby fee to Colombia for the loan commitment (Tr. 33–36, 311–313, 1198–1199). Crisona received $7,500 out of the $30,000 as an attorney's fee, and the remainder was deposited in escrow (Tr. 36, 41–43, 50, 314–317, 1203–1204). Thereafter, Brown's attorney, Richard Crake, was persuaded to release the amount in escrow on the assurance that it was needed to finalize the funding, and this money was divided among petitioner and the others (Tr. 63–65, 1205, 1208, 1214–1218). The date for closing on the financing agreement, originally set for around December 20, 1965, was postponed by Colombia throughout December and January 1966, despite Brown's eagerness to obtain the funds (Tr. 51, 319, 68, 89). The loan was never secured (Tr. 68).

3. At trial, Crake testified to the substance of a telephone conversation between himself and Crisona on January 18, 1966 (Tr. 90–94). In the conversation,

[4] Sunrise Mountain Corporation was in the process of a Chapter XI reorganization.

Crake expressed doubt as to the good faith of the officers of Colombia and as to the probability that the financing would be obtained (Tr. 91). In turn, Crisona repeatedly assured Crake that the corporation was legitimate and enumerated several of the allegedly successful business ventures concluded by Colombia (Tr. 91–92). Crisona also told Crake that the $7,500 he had received as an attorney's fee had been turned over to Colombia; that this fee would be returned to him (Crisona) by Colombia in a day or two; and that he expected that final arrangements for the loan would be completed shortly (Tr. 91). At the conclusion of Crake's direct testimony, the jury was allowed to hear a tape recording made by Crake at the time of the conversation and to read from a transcript of the recording (Tr. 96, 114).

An F.B.I. report of an interview with Crake indicated that Crake had recorded other conversations with representatives of Colombia Resources (Tr. 98–99). On cross-examination, Crake testified that he recorded other conversations with Crisona during the three-day period he was in New York in January and that he had turned the tapes over to the government (Tr. 158–159). He also recorded a conference call with Williams (defendant Neiman) and a judge of a bankruptcy court which he also gave to the government (Tr. 160–167).

Counsel for Crisona, subsequently joined by counsel for petitioner and other defendants sought production of all tapes made by Crake in addition to the one about which Crake had testified (Tr. 98–108,

169–180, 275–276, 1270–1278). They based their claim alternatively on 18 U.S.C. 3500, on Rule 16, F.R. Crim. P., and on the doctrine of *Brady* v. *Maryland*, 373 U.S. 83. Government counsel claimed that the tapes were not producible, and stated that they contained no material helpful to the defense (Tr. 173). The district judge decided that the government was not required to produce the tapes, and he refused to listen to them himself (Tr. 178, 180, 1278).

The court of appeals concluded that under Rule 16(a), F.R. Crim. P., the tapes were discoverable by the defendant whose voice was recorded thereon as a "statement" of that defendant, as that term is used in the Rule. After having examined the tapes *in camera*, however, the court was convinced that any error in failing to turn over the tapes was harmless (Pet. App. 10a–18a).

## ARGUMENT

Relying upon *Alderman* v. *United States*, 394 U.S. 165, petitioner challenges the *in camera* inspection of the tapes by the court of appeals and the court's ruling that their non-disclosure was harmless error. He contends that their materiality can be determined only by the defense. As to this petitioner, however, there can be no doubt of the validity of the judgment that the error was harmless. Crake testified that he neither saw nor spoke to petitioner (Tr. 235). The jury therefore must have based its verdict against petitioner on evidence other than that of Crake, and there was, as summarized in the opinion below, ample other evidence against this petitioner. Moreover, in-

spection of the recordings will reveal that there are no references to petitioner therein.[5]

In *Alderman,* which involved electronic surveillance by the government, the Court indicated that *in camera* inspection might be permissible "if the trial judge had only to place the transcript or other record of the surveillance alongside the record evidence and compare the two" (394 U.S. at 182). Here the court of appeals could plainly see that petitioner was not involved.

## CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

ERWIN N. GRISWOLD,
*Solicitor General.*

WILL WILSON,
*Assistant Attorney General.*

BEATRICE ROSENBERG,
COLLEEN KOLLAR,
*Attorneys.*

JANUARY 1970.

[5] The transcripts contain references to certain unknown people who at various times answered the telephone at the office of Colombia. However, the conversations were confined to stating that the intended recipient of the telephone call was not there.

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IN THE

# Supreme Court of the United States

**OCTOBER TERM, 1969**

**No. 966**

FRANK LLOYD PARKS,

*Petitioner,*

—v.—

UNITED STATES OF AMERICA

## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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December 15, 1969

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IN THE

# Supreme Court of the United States

**October Term, 1969**

No.

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FRANK LLOYD PARKS,

*Petitioner,*

—v.—

UNITED STATES OF AMERICA.

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## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

The Petitioner, FRANK LLOYD PARKS, prays that a writ of certiorari issue to review the judgment and opinion entered on September 25th, 1969 by the United States Court of Appeals for the Second Circuit in the proceeding entitled United States of America, Appellee, v. Frank Crisona, Anthony DeLyra, John DeLyra and Frank Lloyd Parks, Defendants-Appellants.

### Opinion Below

The opinion of the Court of Appeals, not yet reported, appears in the Appendix hereto. No opinion was rendered by the United States District Court for the Southern District of New York.

## Jurisdiction

The judgment of the Court of Appeals for the Second Circuit, which affirmed the conviction entered against petitioner in the District Court, was entered on September 25, 1969. A timely petition to the Court of Appeals for rehearing, together with a suggestion that the rehearing be heard *in banc,* was denied by order dated October 24, 1969. By order of MR. JUSTICE JOHN M. HARLAN, dated November 13, 1969, the time within which petitioner was required to file this petition was extended to and including December 23, 1969, and this petition was filed on or before that date. The jurisdiction of this Court is invoked under Title 28 United States Code, Section 1254(1).

## Question Presented

Whether it is proper for the Circuit Court of Appeals, in reviewing a ruling of the District Court which refused to direct the government to produce the tape recordings of certain telephone conversations between petitioner and a government witness, to examine transcripts of these recordings *in camera* and summarily determine that the production of these tapes would have been valueless to the petitioner.

## Statutory Provisions

Title 18, U.S.C. Section 371 provides in part:

> If two or more persons conspire . . . to commit any offense against the United States . . . and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000 or imprisoned not more than five years, or both . . .

Title 18, U.S.C. Section 1341 provides in part:

> Whoever, having devised or intending to devise any scheme . . . to defraud . . . for the purpose of executing such scheme . . . places in any post office or authorized depository for mail matter, any matter or thing . . . or knowingly causes to be delivered by mail . . . any such matter or thing, shall be fined not more than $1,000 or imprisoned not more than five years, or both.

Title 18, U.S.C. Section 1343 provides in part:

> Whoever, having devised . . . any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, transmits or causes to be transmitted by means of wire . . . in interstate or foreign commerce, any writings, signs, signals . . . or sounds for the purpose of executing such scheme or artifice, shall be fined not more than $1,000 or imprisoned not more than five years, or both.

Title 18, U.S.C. Section 2314 provides in part:

> . . . Whoever, having devised . . . any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations or promises . . . causes to be transported, or induces any person to travel in, or to be transported in interstate commerce in the execution or concealment of a scheme or artifice to defraud that person of money or property having a value of $5,000 or more . . . shall be fined not more than $10,000 or imprisoned not more than ten years, or both.

## Statement of the Case

On December 11, 1968, a judgment was entered against petitioner in the United States District Court for the Southern District of New York, subsequent to a trial before a District Judge and a jury, which judgment convicted him of 6 counts of an indictment charging mail, wire and interstate fraud in violation of 18 U.S.C. 1341, 1343, 2314 and 2, and one count of conspiracy in violation of 18 U.S.C. 371, and which judgment sentenced him to concurrent prison terms of one (1) year on each of the seven counts. Immediately after sentencing, Parks was released on his own recognizance pending appeal.

The indictment in this case contained 30 counts and, generally, charged petitioner and five co-defendants with various substantive crimes and conspiracy, all based upon an alleged scheme to defraud, through the use of the mails and interstate telephone and telegraphic facilities, certain named individuals of various sums of money in excess of $5,000. Two defendants, Lonardo and Nieman, pleaded guilty in advance of trial, the latter testifying at trial as the government's principal witness. A summary of the evidence adduced at trial is set forth in the opinion of the Court of Appeals which is annexed hereto as an Appendix, and, for that reason, only the facts relating to the specific point on which this petition is based will herein be recited.

Richard Crake, a San Diego attorney, was the government's first witness. He testified that he represented Sunrise Mountain Corporation in its efforts to obtain a mortgage loan through Colombia Resources, and that he dealt largely with the defendant, Crisona, the attorney for Colombia, in connection with these efforts during the period from December, 1965 to January, 1966.

Crake testified that he had telephone conversations with several of the defendants in January, 1966, which he recorded on tape. One of these recorded conversations was played to the jury (R114) and a transcript of this recording was provided as a visual aid for the jury to follow the recording (R108, R114). This conversation was with the defendant, Crisona. There were "perhaps six or more" recordings made by Crake (R170).

On cross-examination, Crake conceded that when he was in New York in mid-January, 1966, in an attempt to finalize the mortgage loan, he had several telephone conversations with Parks, the last of which, on January 18th, he recorded on tape (R246-R248). No attempt was made by the government to introduce this tape into evidence but it clearly appears that a transcript of this tape was used by the government to cross-examine Parks (R2350, R2351).

Defense counsel thus learned that Crake had taped telephone conversations between himself and several of the defendants and their production was requested. The trial judge denied the request, ruling that they were producible neither under 18 U.S.C. 3500, *Brady* v. *Maryland*, 373 U.S. 83 (1963), or Rule 16 of the Federal Rules of Criminal Procedure. With regard to Rule 16, the trial court seemed to rule that the tapes, taken as they were during the alleged commission of the crime, were not "statements" within the meaning of Rule 16(a). This denial was affirmed by the Circuit Court of Appeals which, after reviewing the tapes *in camera*, held that although these tapes were statements under Rule 16(a) they were irrelevant to the defense of the case and therefore properly withheld.

## Reasons for Granting the Writ

The decision of the Court of Appeals raises an important problem in the administration of Federal criminal justice. The net result of that decision has been to abridge a substantial right of defendants, a right which the decisions of this Court have sought to protect. The decision of the Court of Appeals on the issue of disclosing "statements" of a defendant is also in conflict with recent decisions of the United States Supreme Court.

The Court of Appeals has decided that the trial court's failure to order the government to turn over to petitioner's trial counsel certain recorded statements made by at least two of the defendants which were concededly in the government's possession, was not reversible error because that Court had examined *transcripts* of those recorded statements and had made the determination that "they contain no information which could reasonably have been additionally useful to the defense". (Slip opinion 16a) We respectfully submit that this holding is in error.

Petitioner, FRANK LLOYD PARKS, respectfully requests this Court to review the decision of the Court of Appeals in light of this Court's recent decision in *Alderman* v. *United States*, 394 U.S. 165, 89 S. Ct. 961 (1969). Although in that case the defendant's objective in requesting disclosure of recorded statements made by him differs from the case at Bar, the underlying principle enunciated in the *Alderman* decision would clearly mandate a similar result in the instant case.

As previously stated, the Court of Appeals has determined that the trial court did not commit reversible error because the evidence it withheld from the defendant was not, in effect, relevant to the defense of the case. Mr. Justice White, in the

*Alderman* decision, spoke directly to this issue, i.e.: whether any Court may make such a determination, and the Court unequivocally held that such a determination is improper. In reaching that conclusion this Court was mindful of the fact that "there may be much learned from an electronic surveillance which ultimately contributes nothing to probative evidence."

The decision of the Court of Appeals is diametrically opposed to the holding of Mr. Justice White in *Alderman*. The petitioner vigorously questions that Court's ability to make a determination of relevancy, especially after it only read transcripts of the tape-recorded conversations. After examining the words of this Court in *Alderman*, "An apparently innocent phrase, a chance remark, a reference to what appears to be a neutral person or event . . .", can there be any question as to the applicability of this principle to the case at Bar where the credibility of a principal government witness was a substantial issue? As urged in his Brief on Appeal to the Court of Appeals, counsel had a right to inspect these statements with a view toward using them in cross-examination. It is interesting to note that this Court in *Alderman* apparently felt that the right of complete disclosure was so fundamental that it could not even be abridged where the national security was at stake—thus the option of "disclose or dismiss".

Further, it should be noted that of the six substantive counts of which petitioner was convicted *three* of them (counts 8, 9 and 12) related to Crake's client, Sunrise Mountain Corporation, and it cannot be denied that Crake's testimony was of critical importance to this phase of the government's case.

Both contemporaneous with and subesquent to the *Alderman* decision this Court has seen fit to order a rehearing or re-examination where a lower Court had summarily ruled that evidence was not material to the petitioner's case where defense counsel was not given an opportunity to examine and inspect that evidence. *Gorman* v. *United States,* 394 U.S. 913, 89 S. Ct. 1177 (1969); and *Fannon* v. *United States,* 394 U.S. 454, 89 S. Ct. 1224 (1969).

The petitioner, FRANK LLOYD PARKS, further questions the Court of Appeals' statement that "We are well aware that the usefulness of such statements should ordinarily be assessed by defense counsel rather than by us, and we expect that that will be the procedure in the future". (Slip opinion 16a) What basis is there for a prospective application? Petitioner respectfully submits that the *Alderman* rule is not a newly established standard for the Second Circuit, thereby prompting the issue of retroactivity. This rule was clearly established by the Supreme Court in March, 1969, more than six months before the Court of Appeals decision. It is, therefore, urged that the *Alderman* rule must be applied to the case at Bar.

In order that this Court may remedy the Court of Appeals' misapplication of these critical principles of law it is respectfully urged that a review of the judgment below is required.

## CONCLUSION

**For the reasons indicated, a writ of certiorari should issue to review the judgment and opinion of the Court of Appeals for the Second Circuit.**

Respectfully submitted,

EUGENE J. MORAN
*Counsel for Petitioner*

December 15, 1969

# APPENDIX

## Opinion and Judgment of the Court of Appeals

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Nos. 624, 625, 626, 627—September Term, 1968.

(Argued May 23, 1969 Decided September 25, 1969).

Docket Nos. 33130, 33131, 33132, 33133

UNITED STATES OF AMERICA,

*Appellee,*

—against—

FRANK CRISONA, ANTHONY DELYRA, JOHN DELYRA, and FRANK LLOYD PARKS,

*Defendants-Appellants.*

Before:

LUMBARD, *Chief Judge,*
FEINBERG, *Circuit Judge,* and TIMBERS, *District Judge.**

Appeals from convictions after a jury trial in the United States District Court for the Southern District of New York, Thomas F. Murphy, *J.*, for fraud and conspiracy to defraud in violation of 18 U.S.C. §§ 371, 1341, 1343, 2314. Affirmed.

MAURICE EDELBAUM, New York, N. Y., *for appellant Crisona.*

JAMES M. LA ROSSA, New York, N. Y., *for Appellant Anthony DeLyra.*

* Chief Judge of the District of Connecticut, sitting by designation.

JOSHUA N. KOPLOVITZ, New York, N. Y. (Koplovitz and Fabricant, on the brief), *for Appellant John DeLyra.*

EUGENE J. MORAN, New York, N. Y., *for Appellant Parks.*

JAMES D. ZIRIN, Assistant United States Attorney (Robert M. Morgenthau, United States Attorney for the Southern District of New York, Kevin J. McInerney, Elkan Abramowitz, Assistant United States Attorneys, on the brief), *for Appellee.*

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FEINBERG, *Circuit Judge*:

This appeal is from four judgments of conviction entered in the United States District Court for the Southern District of New York on December 11, 1968, after a four week trial before Thomas F. Murphy, *J.*, and a jury. Defendant Frank Crisona was found guilty on ten counts covering violation of the wire fraud statute, 18 U.S.C. § 1343, inducing interstate travel in execution of a fraud and interstate transportation of the proceeds of a fraud, 18 U.S.C. § 2314, and conspiracy, 18 U.S.C. § 371. Defendants Anthony and John DeLyra were found guilty on substantially similar counts and also on one count of mail fraud, 18 U.S.C. § 1341. Frank Lloyd Parks was convicted of a total of seven counts for wire and mail fraud, interstate travel in execution of a fraud, and conspiracy. The first three defendants were each sentenced to three years, and Parks to one year, imprisonment on all counts to run concurrently. Prior to trial two other defendants, Dominic C. Lonardo and John Martin Neiman, pleaded guilty to one and 17 counts, respectively, and subsequently Neiman testified as a government witness.

*Opinion and Judgment of the Court of Appeals*

## I. The Conspiracy

The indictment charged all four appellants, Neiman and Lonardo with conspiring to defraud and actually defrauding many individuals and corporations. While only Parks challenges the sufficiency of the voluminous evidence developed at trial, a summary of the numerous and complex financial dealings which underlie appellants' convictions is helpful in considering the various legal issues raised. The evidence introduced by the Government allowed a jury to find the following.

Crisona, a former Assistant District Attorney for Queens County, New York, first met Neiman, whom the Government aptly describes as a "professional confidence man with a long criminal record," in October 1964, when they engaged in a joint atempt to salvage financially a summer camp in which Crisona had an interest. The attempt failed, and the camp was lost, leaving Crisona $15,000 in debt to a loan shark, but the business association between the two men survived. In the summer of the following year, Neiman entered into negotiations with one William Sikora, a New Jersey real estate operator, to provide Sikora with a commitment for a $3,000,000 loan, and persuaded him to pay a security deposit of $10,000 in the form of a check made out to Crisona, as attorney, to be held in escrow pending the funding of the loan. Crisona promptly cashed the check and split up the proceeds between himself, Neiman and Crisona's loan shark. Apparently during this period Crisona first met Anthony DeLyra, with whom Neiman had done business in the past, and Parks, a former stockbroker who used an office in the same building as John DeLyra. Anthony was introduced to Sikora as an individual who would advance sums for the latter's loan

and Parks was presented to him as the stockbroker who was going to handle the financing. Evidently no loan was ever consummated.

In October 1965, Neiman and the DeLyras somehow came into possession of a stolen $9,200 cashier's check payable to a recently deceased woman named Mary McCarthy. Pursuant to Crisona's suggestion a joint checking account in the names of Mary McCarthy and a fictitious John O'Brien was opened in a branch of the Franklin National Bank and the check deposited in it. Within the next few days Crisona signed two checks in the name of John O'Brien for $5,600 and $3,500 and he and Neiman then cashed them at the bank and divided up the proceeds among themselves and the two DeLyras. The bank, however, discovered that Mary McCarthy was dead. The check was dishonored, and Crisona was notified that he would be held responsible for the $9,100 overdraft.

In November 1965, Neiman, Crisona and the DeLyras, who were apparently all in debt, and Parks, who was unemployed, devised their basic scheme of utilizing a foreign corporation owned by John DeLyra, Columbia Resources, Ltd., to issue real estate financing commitments. To make the corporation appear financially sound, they prepared a false financial statement showing a net worth of $11,000,000,[1] which was submitted to Dun and Bradstreet as a basis for a credit rating, along with false resumes of the backgrounds of four officers of Columbia, two of whom were pseudonyms for Neiman and Anthony DeLyra. Utilizing this false statement, and the excellent Dun and Bradstreet rating they eventually received, and variously presenting themselves as officers of

[1] This was later altered to show even greater worth.

the corporation, often under assumed names, the defendants thereafter used Columbia Resources as a front for obtaining advance fees from various individuals and corporations in return for letters of intent or commitments to secure real estate financing. In most instances the advance was presumably to be held in escrow by Crisona, as attorney, pending the funding of the loan, but was in fact immediately distributed among Neiman and the defendants. None of the Columbia loan financings was ever consummated.

The specific transactions of this nature which form the basis of the various counts on which appellants were indicted may be outlined briefly, as they all follow substantially the same pattern.

(1) *Kline.* In November 1965, Neiman was referred to a Boston real estate developer, Sydney Kline, to whom he sent a copy of the false financial statement and offered a commitment for a $700,000 first mortgage to finance a nursing home which Kline planned to construct. A man named Graeber, acting for Neiman, went to Boston and attempted to secure a two per cent standby fee or deposit from Kline in return for a commitment letter. At Graeber's suggestion Kline spoke on the telephone to Crisona, who assured him that Columbia was a reputable firm which he had often represented and that Kline's check for the advance fee would be held in escrow pending completion of the transaction. Kline then wrote out a check for $13,500 to Crisona which Crisona, when he received it, promptly cashed and distributed among his colleagues.

In late December, a second commitment of $125,000 for another nursing home was arranged with Kline after a purported appraisal of the property by John DeLyra, under a

false name, who elicited another standby fee check for $2,500 which was again supposed to be held in escrow. When Kline became suspicious of the lack of progress in the financing he called Crisona and asked for his money back, but was told that it had been turned over to Columbia.

(2) *Sunrise Mountain Corp.* In December 1965, Neiman made contact with A. Earle Brown, the owner of Sunrise Mountain, a development corporation which was in Chapter XI reorganization; Brown was seeking a $3,000,000 loan for a real estate project in Las Vegas. At initial meetings between Brown, Neiman—under an assumed name—and Crisona, it was agreed that Sunrise would pay a $30,000 standby fee to Columbia for a $3,000,000 loan commitment. Crisona assured Brown of the corporation's reliability and its ability, based on the false financial statement, to fund the loan. Subsequently, Brown and his attorney, Richard Crake, met with Crisona, Neiman and Parks, who was introduced as a Columbia officer who acted as a West Coast liaison man. Crisona again made assurances of his own and Columbia's respectability and it was agreed that out of the standby payment Crisona would receive a $7,500 attorney's fee with the balance being placed in escrow. As the date when the funding was scheduled drew near, however, Crisona persuaded Brown and Crake, who was co-escrowee with Crisona, to release the escrow fund, finally assuring them that the closing of the funding would take place the same day. Crisona immediately deposited the escrow check and distributed the proceeds, using a portion of them to pay off the overdraft caused by the McCarthy-O'Brien transaction. He never showed up for the closing, which continued to be repeatedly postponed with a variety of excuses. During January 1966,

Crake had a number of telephone conversations with Neiman, Crisona, and Parks, at least some of which he tape recorded. On January 19, Crake and Brown finally went to the office of the United States Attorney for the Eastern District of New York and requested an investigation of Columbia.

(3) *Tuller.* At approximately the same time, Neiman and Anthony DeLyra, again using false names, obtained a check for $8,500, in return for a letter of intent to obtain a $850,000 loan for a Julliard Tuller of Silver Springs, Maryland. As usual, the closing of the loan was repeatedly delayed and as a result, the mortgage on Tuller's property was foreclosed at a loss of $300,000.

(4) *Menlove.* In February 1966, Parks and Neiman persuaded Roy Menlove, a Salt Lake City motel owner, to put up an advance fee of $11,000 for a prospective $1,100,000 loan by Columbia, after Parks had conducted an "appraisal" of Menlove's property and Menlove had been furnished a copy of the Dun and Bradstreet report based on the false financial statement on Columbia. The loan closing was twice adjourned and never took place.

(5) *Fazio.* In return for a letter of intent to provide a $1,500,000 loan for a motel, a Mr. Fazio in Cleveland gave Neiman a check for $11,500 on account. The loan was not funded.

(6) *Howard Rome.* In April 1966, after negotiations between Neiman, Parks, John DeLyra, Crisona and a Howard Rome in Cleveland, it was agreed to arrange a $1,350,000 loan for Rome with a $13,500 advance fee. Once again these negotiations involved an "appraisal" by Parks, false financial information, aliases and a variety of lies about the

identity and experience of purported Columbia Resources executives. Crisona dissuaded Rome from putting the advance in escrow and it was divided among various participants.

(7) *Indianapolis.* In July 1966, Neiman and John DeLyra persuaded Morris Mitchell and Ary Infante, Indianapolis businessmen, to advertise that their company had funds available for loans and to refer prospective customers to Columbia in return for 25 per cent of advance fees collected. Over the following weeks Neiman and the two DeLyras collected a total of $19,000 in advance fees from customers so recruited.

Defendant Crisona testified in his own behalf that he had acted exclusively as a lawyer in the transactions with which he was involved, that in effect he was innocently misled by Neiman and that he never intended to defraud anyone or knowingly made any false representations. By its verdict the jury clearly discredited this testimony. Defendant Parks testified that he was unaware of the fraudulent nature of the enterprises and that the appraisals he conducted were done in good faith. Neither of the DeLyras took the witness stand.

On appeal, defendants jointly and separately raise a number of claims of error in the proceedings below. In addition, appellant Parks attacks the sufficiency of the evidence against him. We will discuss these various arguments in turn; as will be seen, we find none of them persuasive.

II. Failure to Turn Over Tape Recordings

Crisona's main argument on appeal, adopted by all of the other defendants insofar as applicable to them, relates to the district court's refusal to order the Government to turn over to the defense tape recordings made by Crake, the lawyer in the Sunrise Mountain Corporation transaction, of various telephone conversations. Crake testified about one such conversation, held on January 18, 1966, in which Crisona told Crake that the $7,500 advance fee had been turned over to Columbia Resources, reassured him that the corporation was "legitimate," and described to him some of the other successful "deals" by Columbia on which Crisona had worked. Toward the end of Crake's direct testimony, he identified a tape, which was subsequently received in evidence and played to the jury, as a recording of this January 18 telephone conversation. Crake also recorded a number of other telephone conversations including several with Crisona and Neiman and Parks. Crake turned these tapes over to the F.B.I., but none was introduced at trial except for the one of the January 18 conversation. At trial, defense counsel called for the production of all of the tapes, basing their request alternatively on 18 U.S.C. §3500, Rule 16 of the Federal Rules of Criminal Procedure, and the doctrine of *Brady* v. *Maryland*, 373 U.S. 83 (1963). The trial judge denied disclosure of the tapes on all three grounds, and all are raised here on appeal. Defense counsel also asked the judge to listen to the tapes himself or to mark and seal them as a court exhibit for appellate review, but he declined both suggestions.

1. *Section 3500*

Appellants' first argument is that the tapes should have been turned over to the defense under the provisions of the Jencks Act, 18 U.S.C. §3500:

> (a) In any criminal prosecution brought by the United States, no statement or report in the possession of the United States which was made by a Government witness . . . to an agent of the Government shall be the subject of subpoena, discovery, or inspection until said witness has testified on direct examination in the trial of the case.
>
> (b) After a witness called by the United States has testified on direct examination, the court shall, on motion of the defendant, order the United States to produce any statement (as hereinafter defined) of the witness in the possession of the United States which relates to the subject matter as to which the witness has testified.

Under subsection (e) the term "statement" as used in subsection (b) is defined as:

> (1) a written statement made by said witness and signed or otherwise adopted or approved by him; or
>
> (2) a stenographic, mechanical, electrical, or other recording, or a transcription thereof, which is a substantially verbatim recital of an oral statement made by said witness to an agent of the Government and recorded contemporaneously with the making of such oral statement.

The court below declined to order the tapes turned over to defense counsel under section 3500. The apparent ground for the ruling was that Crake had not testified about any recorded conversation other than the one on January 18—

the transcript and tape of which were turned over since the Government introduced them into evidence—and there was no showing that the remaining tapes related to the subject matter of the direct testimony. We need not consider the correctness of this restrictive interpretation of section 3500(b), see *United States* v. *Birnbaum*, 337 F. 2d 490, 497-98 (2d Cir. 1964), since we find that the tapes were not "statements" within the meaning of the Jencks Act. The tapes of these telephone conversations do not come within subsection (e)(2) as they are not recordings of oral statements made to a government agent. Nor, as appellant Anthony DeLuca contends, are the recordings and the transcripts made from them "in effect" a written statement under subsection (e)(1).

Our decision in *United States* v. *Birnbaum, supra*, is not inconsistent with this analysis. There we upheld the refusal of the trial judge to turn over to the defense tape recordings of two conversations between the defendant, indicted for bribing an Internal Revenue agent, and a government witness. While we noted that "[t]here is no dispute that the transcripts [of the recorded conversations] are 'statements' within the meaning of subsection (e) of the Act," 337 F. 2d at 497, that dictum was based on circumstances in which the recordings were made at the direction of the F.B.I. with the specific objective "to garner evidence of appellant's complicity in the bribery scheme." *Id.* at 498. In the factual situation there present the statements of witnesses might reasonably be construed as being made "to an agent of the Government." Indeed, there is authority for interpreting the Jencks Act not to apply at all to the sort of pre-investigatory communications

involved in this case. Thus, the Seventh Circuit, upholding a refusal to turn over to the defense a contemporaneous tape recording of a conversation between the payer and the recipient of a bribe—witness and defendant, respectively—in a subsequent prosecution for extortion, has defined Jencks Act material succinctly:

> A § 3500 statement is a recorded recital of past occurrences made by a prospective prosecution witness. From its very nature, necessarily it is made after those events have taken place.

*United States* v. *Sopher*, 362 F. 2d 523, 525 (7th Cir.), cert. denied, 385 U.S. 928 (1966). Cf *Battaglia* v. *United States*, 349 F. 2d 556, 560 (9th Cir.), cert. denied, 382 U.S. 955 (1965). We need not now decide whether we would similarly limit the scope of material obtainable under the Act in an appropriate case although our dictum in *Birnbaum* clearly looks the other way. It is sufficient for the purposes of this appeal that the telephone conversations of witness Crake were in no sense "to an agent of the Government."[2]

2. *Rule 16(a)*

Appellants next contend that the tapes or transcripts should have been produced under Fed. R. Crim. P. 16(a):

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[2] The record indicates that at one point during the trial counsel for defendant Parks speculated that Crake, since he had been to see the United States Attorney in Brooklyn, might have been acting at the latter's direction in taping the conversations and thus "as an agent" of the Government. The trial judge suggested that counsel could readily ascertain that fact by asking either that government attorney or Crake. Counsel did not pursue the matter further on the record. In any event, it is clear that Crake began taping the conversations before he visited the United States Attorney and there is nothing in the record to indicate that he continued to do so by virtue of governmental instructions.

> Upon motion of a defendant the court may order the attorney for the government to permit the defendant to inspect and copy or photograph any relevant (1) written or recorded statements or confessions made by the defendant, or copies thereof, within the possession, custody or control of the government, the existence of which is known, or by the exercise of due diligence may become known to the attorney for the government . . . .

The trial judge denied such a request on the theory that the section does not cover statements made by a defendant prior to arrest.[3] On appeal the Government vigorously defends that ruling, contending that "statements or confessions" under Rule 16(a) do not include pre-arrest statements made by a defendant during the course of the commission of a crime. The question has divided trial judges; the authorities were collected most recently by Judge Frankel in the Southern District of New York in a thorough opinion. *United States* v. *Rosenberg*, 299 F. Supp. 1241 (S.D.N.Y. 1969). While noting that the judges of that district had reached different conclusions on the subject, he concluded that tape recordings taken of conversations in which the defendant allegedly offered an Internal Revenue agent bribes were clearly "statements" under Rule 16(a) and discoverable by defendant. For similar district court rulings, see, e.g., *United States* v. *Lubomski*, 277 F. Supp. 713, 719-22 (N.D. Ill. 1967); *United States* v. *Iovinelli*, 276

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[3] Before the trial, Judge Mansfield denied a similar Rule 16(a) motion by Anthony and John DeLyra on the ground that a recording made at the time of an offense is not a statement under 16(a). *United States* v. *Crisona*, 271 F. Supp. 150, 157 and n. 15 (S.D.N.Y. 1967), modified in unpublished memorandum, Jan. 10, 1968.

F. Supp. 629, 630-31 (N.D. Ill. 1967); *United States* v. *Leighton*, 265 F. Supp. 27, 34 (S.D.N.Y. 1967); cf. *United States* v. *Baker*, 262 F. Supp. 657, 671-72 (D. D.C. 1966). The bases of these decisions have been that the language of amended Rule 16(a) is unqualified in contrast to the limited definition of "statement" in section 3500, that the Notes of the Advisory Committee indicate that the amended Rule was intended to apply even to pre-arrest statements made by a defendant during the course of his crime and was meant to broaden materially the scope of discovery available to a defendant,[4] that such a statement is obviously of such vital importance to the defense that fairness compels its disclosure, and that guilty pleas will thereby be encouraged. This broad interpretation of "statement" in Rule 16(a) is supported by the recent recommendation of the ABA Project on Minimum Standards for Criminal Justice, Standards Relating to Discovery and Procedure Before Trial 62 (1969) that a defendant receive before trial all of his statements

> regardless of to whom they were made—whether a prosecuting attorney, an investigator, a grand jury . . ., or anyone else. It is also intended that statements be discoverable regardless of how they are obtained, whether surreptitiously or voluntarily.

We agree with these conclusions and see nothing in the plain language of Rule 16(a) or the Notes of the Advisory Com-

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[4] In amending the Rule in 1966, the Advisory Committee noted that:

> The defendant is not required to designate because he may not always be aware that his statements or confessions are being recorded. . . . Discovery of statements and confessions is in line with what the Supreme Court has described as the "better practice" (Cicenia v. LaGay, 357 U.S. 504, 511 (1958)) . . . .

mittee accompanying it which would justify imposing the limitation suggested by the Government. See *United States* v. *Knohl,* 379 F.2d 427, 441-42 (2d Cir.), cert. denied, 389 U.S. 973 (1967) (dictum).

Having concluded that the tapes of defendants' conversations are "statements" under Rule 16(a), we must still decide whether failure to turn them over was reversible error. The Government points out that the language of the section is not mandatory—"the court *may* order the attorney for the government" (emphasis added)—and indeed this has been the focus of another dispute in the district courts over what showing of need, if any, a defendant must make in the ordinary case to compel inspection of his statement. E.g., compare *United States* v. *Projansky,* 44 F.R.D. 550 (S.D.N.Y. 1968), with *United States* v. *Louis Carreau, Inc.,* 42 F.R.D. 408 (S.D.N.Y. 1967). We note that weighty scholarly authority supports the proposition that withholding a defendant's statement should be the exception, not the rule, subject to the court's power to impose a protective order when appropriate. See ABA Project on Minimum Standards for Criminal Justice, Standards Relating to Discovery and Procedure Before Trial 52-53, 58-61 (1969); 8 Moore, Federal Practice ¶16.05[1] (2d ed. 1969). However, we need not discuss that issue more fully because the trial judge here ruled as a matter of law—not of discretion—that the tapes did not qualify as statements.

On the facts of the present case, however, we hold that the trial judge's failure to compel disclosure of the tape recordings under Rule 16(a) was not reversible error. Aside from the one recorded conversation to which Crake testified and which was played to the jury, a transcript of

which was furnished the defense, none of the others was introduced in evidence. While none of the latter tapes was otherwise made available to the defendants, we have closely examined the transcripts[5] of the tapes and find that they contain no information which could reasonably have been additionally useful to the defense. Moreover, we note that the cumulative evidence of defendants' guilt adduced at trial was very substantial indeed. In sum, while the tape recordings of conversations of defendants were "statements" under Rule 16(a), we find that the court's failure to make them available was not in fact harmful.[6] Cf. *Rosenberg* v. *United States*, 360 U.S. 367 (1959); *United States* v. *Annunziato*, 293 F. 2d 373, 381-82 (2d Cir.), cert. denied, 368 U.S. 919 (1961). We are well aware that the usefulness of such statements should ordinarily be assessed by defense counsel rather than by us, and we expect that that will be the procedure in the future. In any event, we will apply the interpretation of Rule 16(a) that we adopt here to all motions made thereunder after this opinion is filed.

3. *Brady* v. *Maryland*

The third ground of alleged error involving the tapes is based on the doctrine of *Brady* v. *Maryland*, 373 U.S. 83 (1963), under which the prosecution is required to turn over to the defense any material evidence in its possession

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[5] These have been furnished to us by the Government, and we are lodging them with the Clerk of the Court in a sealed envelope pending further review, if any, of the case.

[6] We put to one side the fact that counsel for Parks did not specifically request the tapes at trial. We note that it was not clear at trial that conversations with Parks had been recorded; that information is disclosed by the transcripts of the tapes.

which is favorable to the accused. Although the prosecution below represented to the trial judge that there was no exculpatory or contradictory information in the tapes, defendants maintained that the trial judge should himself listen to the tapes in order to determine whether the defense was entitled to obtain them in the interest of justice. The trial judge declined to do so, and appellants argue that a government prosecutor cannot be expected to be able to make a meaningful evaluation of what material may be useful to defense counsel and that, at the least, possibly useful material should be objectively reviewed by the trial judge. We realize that the problem is a real one which has been the subject of substantial discussion. See, e.g., ABA Project on Minimum Standards for Criminal Justice, Standards Relating to Discovery and Procedure Before Trial 73-78 (1969); Note, The Prosecutor's Constitutional Duty to Reveal Evidence to the Defendant, 74 Yale L.J. 136, 147-49 (1964). However, appellants themselves concede the lack of any precedent for such a procedure, and indeed, this court has very recently restated the present legal principle that, with certain limited exceptions not here applicable, "the assurance by the government that it has in its possession no undisclosed evidence that would tend to exculpate defendant justifies the denial of a motion for inspection that does not make some particularized showing of materiality and usefulness." *United States* v. *Evanchik*, F. 2d , (2d Cir. July 16, 1969). The request here was for a known item—tapes of conversations to which one or more defendants were parties; the record below discloses no such particularized showing of need; and as we have already noted, we have examined the tran-

script of the tapes and found it to contain nothing that would have been additionally useful to the defense.

## III. The McCarthy-O'Brien Transaction

Appellants' next argument is that evidence about the fraudulent bank account established with the check of the deceased Mary McCarthy, introduced over their objections, should have been excluded because its probative value was far outweighed by its prejudicial effect. In addition, they object to the Government's introduction of false grand jury testimony by Crisona relating to the transaction and cross-examination in which Crisona repeatedly contradicted that testimony. The Government contends, on the other hand, that the check episode was admissible to show motive for appellants' subsequent conduct, i.e., proceeds from the Sunrise Mountain Corporation fraud were needed and used to pay off the $9,100 overdraft created when the McCarthy check was stopped. Secondly, the Government justifies the introduction of the transaction and Crisona's grand jury testimony about it as relevant to Crisona's liability.

It has been this court's "consistently held position that evidence of similar acts, including other crimes, is admissible for any relevant purpose other than merely to show defendant's bad character." *United States* v. *Johnson*, 382 F. 2d 280, 281 (2d Cir. 1967). We do not think that the substantial and pressing financial obligation arising from the transaction is of insignificant probative value on the issue of appellants' motivation for their subsequent frauds. Cf. *United States* v. *Kahaner*, 317 F. 2d 459, 470-

72 (2d Cir.), cert. denied, 375 U.S. 836 (1963). Nor are we impressed by the magnitude of the prejudicial impact of what appellant Crisona terms "the repulsive tale as to the theft of the dead woman's check" in the context of appellants' numerous other financial misappropriations. Cf. *United States* v. *Bradwell,* 388 F. 2d 619, 622 (2d Cir.), cert. denied, 393 U.S. 867 (1968); *United States* v. *Jordan,* 399 F. 2d 610, 612-13 (2d Cir.), cert. denied, 393 U.S. 1005 (1968). Moreover, it was the defendants themselves who, on cross-examination of government witness Neiman, brought out the "repulsive" aspects of the affair—that the check was stolen and that Mary McCarthy was dead. Finally, the trial judge took pains in his instructions to the jury to limit the effect of the evidence. Appellants rely heavily on the decision of this court in *United States* v. *Byrd,* 352 F. 2d 570 (2d Cir. 1965). But we have made clear that *Byrd* itself only "reiterated that where the pertinent factors have been duly considered, the admissibility of the evidence is a matter in which the trial judge should be allowed a wide range of discretion." *United States* v. *Deaton,* 381 F. 2d 114, 118 n. 3 (2d Cir. 1967). Assessing the "pertinent factors" here involved, we do not think that the trial judge abused his discretion.

## IV. Failure to Rule in Advance on Defendants' Convictions

Appellant John DeLyra contends that the trial judge erred in refusing to make an advance ruling with regard to the admissibility for impeachment purposes of certain prior convictions. During a recess on a Friday near the end of the

Government's case, the attorney for both John and Anthony DeLyra informed the judge that he was "contemplating the possibility" that either or both would testify but that he understood that both had been convicted of crimes 25 or more years before; he requested the court to rule whether it would allow the Government to bring out the convictions if the defendants were to testify. The following Monday the trial judge declined to make such an advance ruling. On appeal, we are told that John DeLyra had been convicted of vagrancy and of petit larceny in 1935, and that between 1937 and 1940 he was charged with concealment of leased property, for which he was ultimately fined $300.[7] Appellant, relying largely on this court's decision in *United States* v. *Palumbo,* 401 F. 2d 270 (2d Cir. 1968), cert. denied, 394 U.S. 947 (1969), argues that these ancient and relatively minor convictions should not have been available to the Government to impeach his credibility and that the trial judge had discretion to prevent such use and should have so ruled before appellant decided whether to take the stand.

It is true that *Palumbo* stands for the proposition that a trial judge has discretion to exclude evidence of prior crimes in an appropriate case and to decide to do so in advance of defendant's testifying. However, while such a practice may sometimes be desirable, *Palumbo* does not suggest, as appellant would have us rule, that it is necessarily error for the judge to defer exercising that discretion until the defendant has in fact testified. Indeed, in *Palumbo* itself, we stressed that the trial judge has discretion in this area, see 401 F. 2d at 274, and we have subsequently approved a district court's

[7] Anthony DeLyra apparently does not press this claim of error on appeal; in any event, our disposition of it would be the same.

discretionary refusal to make advisory rulings in similar circumstances. See *United States* v. *Evanchik*, —— F. 2d —— (2d Cir. July 16, 1969); *United States* v. *Hart*, 407 F. 2d 1087, 1088-89 (2d Cir. 1969). Under these circumstances, we hold that there was no abuse of discretion in the trial judge's failure to make an anticipatory ruling.

## V. Objections to Jury Instructions

### 1. *Charge on intent*

Appellant Anthony DeLyra contends that the trial judge, in instructing the jury, failed to make clear that the element of criminal intent must have been proved as to each of the charges beyond a reasonable doubt. In charging on the many different counts, the judge repeatedly included intent or knowledge as one of the elements which the Government had to establish beyond a reasonable doubt as to each offense. Immediately after the charge, defense counsel took exception to the court's failure specifically to instruct the jury on the elements of wilfulness and knowledge. Consequently, the judge then gave the supplemental charge:

> Ladies and gentlemen, I am told that in my charge in explaining the counts . . . that I called the wire crimes and travel crimes and the transport-money-by-fraud crimes, I neglected to tell you one of the elements that the government must prove with regard to each defendant accused in those crimes is that he did the act complained of knowingly and wilfully; and that means that he had to have an evil intent at the time of the alleged crime; not something that he did negligently or accidentally but purposefully. In other words,

> he had a criminal intent when he is alleged to have committed these crimes.

Appellant apparently argues that the court should have again stated that this element of the crime had to be proved beyond a reasonable doubt. In view of the judge's prior instructions, this was unnecessary. Indeed, defendants made no further objection. Cf. *United States* v. *Indiviglio*, 352 F. 2d 276 (2d Cir. 1965) (*en banc*), cert. denied, 383 U.S. 907 (1966).

2. *Missing witness charge*

Appellant John DeLyra raises as error the trial judge's instruction on missing witnesses. In his summation counsel for Crisona several times called attention to the failure of the Government to summon certain individuals as witnesses; in reply, the prosecuting attorney noted that the defense could have obtained the presence of witnesses by subpoena. In his jury charge, the trial judge commented:

> During summations there was considerable reference to where a certain witness was and to the fact that he wasn't called. In a federal criminal trial both the government and a defendant are entitled to receive from the clerk of the court a subpoena calling for the attendance of a witness, and no matter where the witness lives in the United States, he is required to appear when served with such a subpoena.
>
> Now, X or Y or Z could have been called by either side as a witness, so that from the failure of either side to call him or them you may infer that his or their testimony might have been unfavorable to either the government or to a defendant, but it is equally within your discretion to draw no inference at all from

the failure of the government or a defendant to call X or Y or Z.

Appellant argues that allowing the jury to draw an unfavorable inference from his failure to call a witness infringes upon his right to rest upon the Government's burden of proof. But we have long held that it is proper to instruct the jury that "the failure to produce such a witness is open to an inference against either party." *United States* v. *Dibrizzi*, 393 F. 2d 642, 646 (2d Cir. 1968); see *United States* v. *Armone*, 363 F. 2d 385, 404-05 (2d Cir.), cert. denied, 385 U.S. 957 (1966); *United States* v. *Evanchik*, *supra*, F. 2d . Additionally, appellant argues that this charge is only permissible where the witness is "equally available" to both sides, that the power to subpoena does not establish "equal availability," and that in fact the witnesses referred to were not "as a practical matter" available to the defendant. We noted in *United States* v. *Armone*, *supra*, 363 F. 2d at 405, that "[i]f the court had stated that a witness was available who was not, in fact, available, a different picture might have been presented," but defendant made no assertion either below or here on appeal that any specific individual was unavailable to him. Indeed, no exception whatever was taken to the charge, which is sufficient in itself to be dispositive. See *United States* v. *Indiviglio*, *supra*. In sum, we find no merit in appellants' objection to the charge.

VI. Improper Juror Discussions

Shortly before the charge, counsel for the DeLyras represented to the judge that there had been improper dis-

cussions among the jurors. Rose DeLyra, sister-in-law of the DeLyras, then testified that a few days before she had heard three female jurors discussing the case in the ladies' room and that one of them had said "He's guilty," and another, "If you ask me they're all guilty." Mrs. DeLyra said she could identify with certainty only one of the women and was uncertain who had said what. Counsel for the DeLyras requested an inquiry of the jurors and the trial judge agreed that he would conduct one. Subsequently the judge did confer *in camera* with each of the four female jurors and a female alternate juror, and stated that he was satisfied that there was no basis in fact for Mrs. DeLyra's testimony. On appeal, John DeLyra claims that the judge should have conducted a hearing in open court on the matter with defense counsel present. However, there is no indication that any defense counsel ever requested such a hearing, objected to the judge's course of action, or even took exception to his conclusion. Consequently there is no merit to appellant's contention. See *United States* v. *Kahaner*, 317 F. 2d 459, 482-83 (2d Cir.), cert. denied, 375 U.S. 836 (1963). Moreover, the procedure adopted by the judge seems to have been reasonable under the circumstances. See *Miller* v. *United States*, 403 F. 2d 77, 81-82 (2d Cir. 1968); cf. *United States* v. *Woodner*, 317 F. 2d 649, 651-52 (2d Cir.), cert. denied, 375 U.S. 903 (1963).

## VII. Sufficiency of the Evidence Against Parks

The main argument of appellant Parks is that the evidence against him was insufficient to support his conviction, and that there was no showing that he knowingly participated in the illegal schemes or had any motive for such a participation.

Taking the evidence, as we must, from the view most favorable to the Government, we find sufficient grounds on which the jury could reasonably have reached its conclusion as to appellant's guilt. To summarize the most important facts: Parks was present at meetings among the conspirators at which the details of the scheme were planned and carried out; he received substantial shares of the proceeds of fraudulently obtained advance fees; he presented himself, or was presented, to various victims under aliases and in false capacities and made a variety of misrepresentations to these victims about Columbia Resources. In the light of his intimate and prolonged connection with the other defendants and their illegal enterprise it is not surprising that the jury found unpersuasive his assertion that he was merely an innocent dupe.

Parks raises a second claim of error relating to an allegedly prejudicial line of questioning by the trial judge about certain written appraisal records, but we find it wholly without merit.

Judgments affirmed.

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IN THE

# Supreme Court of the United States

No. 966

FRANK LLOYD PARKS,
*Petitioner,*

—v.—

UNITED STATES OF AMERICA.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

## PETITIONER'S REPLY MEMORANDUM

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February 24, 1970

IN THE

# Supreme Court of the United States

No. 966

FRANK LLOYD PARKS,

*Petitioner,*

—v.—

UNITED STATES OF AMERICA.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

## PETITIONER'S REPLY MEMORANDUM

The United States, in its brief in opposition, indicates in footnote 5 at the bottom of page 9 that: "The *transcripts* of the tape *recordings* disclose that *most* of Parks' conversations consisted of relaying messages . . ." (Emphasis added). Unless the underlined words are typographical errors or mere slips of the author's pen, I am shocked and surprised to learn for the very first time that Crake recorded more than one conversation with Parks.

At the trial Crake first testified that the only conversations which he recorded were with the defendant Crisona (R-161).* On cross-examination he conceded that he thought ". . . there

* References are to the pages of the certified record, unless otherwise indicated.

was *one* conversation with Mr. Parks . . ." that he recorded (R-246). (Emphasis added.) When I pressed the question further Crake stated that "There is just one (recorded conversation with Parks) that I know of . . ." and that this conversation took palce about January 18, 1966 (R-247). He later stated that ". . . Mr. Fanning (the Assistant United States Attorney prosecuting the case) has told me this morning that I had one conversation in the transcripts with Mr. Parks . . ." (R-248). Though I do not have the reference to the page in the record at hand, my recollection of Crake's trial testimony was that he had turned over to Mr. Fanning, well before the commencement of the trial, all recordings of conversations he had had with the defendants. If, in fact, Crake recorded more than one conversation with Parks, then his testimony is, to say the least, inaccurate and the government, by not taking any action to correct that testimony, was a party to the suppression of evidence which, in my opinion, would have been beneficial to Parks' defense. Moreover, the government compounded its error by referring, on page 13 of its brief to the Second Circuit, to *one* conversation with Parks recorded by Crake.

The reference in the footnote mentioned above ". . . that most of Parks' conversations consisted of relaying messages . . ." is, perhaps, the most significant aspect of the brief. Parks' entire defense was that he was an innocent dupe, a messenger boy, who was badly used by a professional confidence man (Neiman). The government's characterization of Parks' function as apparently indicated by the recorded conversations with Crake is certainly not inconsistent with Parks' defense.

In my brief to the Second Circuit I devoted 20 of the 31 pages to a discussion of the insufficiency of the evidence

against Parks. I have only four copies of that brief left but I am submitting three of them to this Court with this reply, not for the purpose of rearguing the sufficiency question, but to demonstrate to this Court that there was, in my honest opinion, a very close question as to Parks' knowing participation in a criminal conspiracy. If that be the case then evidence such as recorded conversations showing Parks to be a mere relayer of messages would be critically important to the consideration by any jury of the question of his guilt.

The Second Circuit reviewed *transcripts* of all the tapes and found ". . . that they contain no *information* which could reasonably have been additionally useful to the defense . . ." (Emphasis added). But Parks wasn't looking for information in requesting the opportunity to hear the recordings. In fact, he was looking for just such harmless, seemingly insignificant conversations described by the government in its footnote to show that he was not an insider, that he was not a trusted member of the criminal conspiracy to whom matters of importance could be divulged, and that Crake knew or at least had an impression that Parks was not in the same category as the other officials of Colombia Resources.

A fair reading of Crake's testimony indicates an attempt by him to put Parks right into the middle of the picture. Parks was introduced to him on December 10, 1965, as an officer of Colombia Resources, who would be their liaison man for the loan sought by Crake's client and who would control disbursements from the control account that would be set up with a portion of the loan proceeds (R-49). Shortly thereafter, Parks, according to Crake, took some part in the

negotiations looking toward an agreement between Colombia Resources and Crake's client.

In disposing of Parks' claim of insufficiency the Second Circuit stated in its opinion (25a):

> "To summarize the most important facts: Parks was present at meetings among the conspirators at which the details of the scheme were planned and carried out . . ."

(Neiman, the government's star witness, testified concerning the meeting for the preparation of the fictitious balance sheet, a keystone of any success enjoyed by the conspirators, and Parks' presence thereat. When asked if Parks contributed anything to the preparation of the balance sheet Neiman stated that "I am not even certain that he [Parks] was aware exactly of what we were doing . . ." [R-1570, R-1571].)

> ". . . he received substantial shares of the proceeds of fraudulently obtained advance fees . . ."

(Neiman's testimony indicated that, during Parks' association with Colombia Resources, Parks received a total of $7,603 from the Company. Neiman also testified that Parks incurred considerable expenses on behalf of the Company and its officers and Parks' uncontradicted testimony was that his expenses, most of which were confirmed by exhibits, exceeded $9,000. In short, it actually cost Parks about $1,500 to work for the Company).

> ". . . he presented himself, or was presented, to various victims under aliases and in false capacities . . ."

(This is absolutely inaccurate. There is not one shred of testimony to support it).

> ". . . and made a variety of misrepresentations to these victims about Colombia Resources . . ."

(This would be true if Parks had reason to believe that the statements he made had no basis in fact. His defense was that he had no such knowledge).

> ". . . In the light of his intimate and prolonged connection with the other defendants and their illegal enterprise it is not surprising that the jury found unpersuasive his assertion that he was merely an innocent dupe."

(This last point presented the most serious challenge to Parks' defense, but it should be remembered that while Parks was associated with Colombia Resources over a period of some six months he did not devote anywhere near his full time to that business. He only made about three appraisals for them during that period and had nothing at all to do with most of the transactions mentioned in the indictment. Three of the six substantive counts of which Parks was convicted concerned themselves with Crake's client, Sunrise Mountain Corporation, and, under those circumstances, it is submitted that it was vitally important for the jury to know that there were recorded conversations which indicate that Crake considered Parks as nothing more than a relayer of messages. Certainly, if the Solicitor General could have concluded from his review of the transcripts that Parks was merely a relayer of messages and was considered to be such by Crake, a jury could have well reached the same conclusion from hearing the recordings and thus they might have given more credence to Parks' defense. Also, if defense counsel had had the opportunity to hear these recordings *before* cross-examining Crake, the tapes may have been of immeasurable assistance in controverting the impression left by Crake's testimony

that Parks was an active participant in a criminal conspiracy).

## CONCLUSION

**For the reasons indicated, a writ of certiorari should issue to review the judgment and opinion of the Court of Appeals for the Second Circuit.**

Respectfully submitted,

EUGENE J. MORAN
*Counsel for Petitioner*

February 24, 1970

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IN THE

# Supreme Court of the United States

**OCTOBER TERM 1969**

**No. 980**

FRANK CRISONA,

*Petitioner,*

—against—

UNITED STATES OF AMERICA,

*Respondent.*

## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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IN THE

# Supreme Court of the United States

**October Term 1969**

No.

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FRANK CRISONA,

*Petitioner,*

—against—

UNITED STATES OF AMERICA

*Respondent.*

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## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioner Frank Crisona respectfully prays that a writ of certiorari issue to review a judgment of the United States Court of Appeals for the Second Circuit entered in this proceeding on September 25, 1969.

## Opinion Below

The opinion of the Court of Appeals, reported at 416 F.2d 107, appears in the Appendix hereto. No opinion was rendered by the District Court for the Southern District of New York.

## Jurisdiction

The judgment of the Court of Appeals for the Second Circuit was entered on September 25, 1969. A timely petition for rehearing and/or rehearing *en banc* was denied on October 24, 1969.

Thereafter, on November 15, 1969, Mr. Justice Harlan signed an order extending the time within which to file the petition up to and including December 23, 1969. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

## Question Presented

Whether, in light of *Alderman* v. *United States*, 394 U.S. 165 and *Dennis* v. *United States*, 384 U.S. 855, The erroneous withholding of "3500" material and the like from defense counsel at the trial should still be governed by a harmless error rule.

## Statutes Involved

*Rule 16, F.R.Cr.P. Discovery and Inspection*

(a) Defendant's Statements; Reports of Examinations and Tests; Defendant's Grand Jury Testimony. Upon motion of a defendant the court may order the attorney for the government to permit the defendant to inspect and copy or photograph any relevant (1) written or recorded statements or confessions made by the defendant, or copies thereof, within the possession, custody or control of the government, the existence of which is known, or by the exercise of due diligence may become known, to the attorney for the government, (2) results or reports of physical or mental examinations, and of scientific tests or experiments made in connection with the particular case, or copies thereof, within the possession, custody or control of the government, the existence of which is known, or by the exercise of due diligence may become known, to the attorney for the government, and (3) recorded testimony of the defendant before a grand jury.

## Statement of the Case

Petitioner, a New York attorney for over twenty-five years (during which time he served as an Assistant District Attorney in Queens County for ten years and also as a confidential law secretary to a Justice of the New York State Supreme Court) was charged in a thirty-count indictment alleging that during the period from January 1, 1965 up to and including January 23, 1967, the petitioner and five co-defendants, John DeLyra, Anthony DeLyra, Dominic C. Lomardo, John Martin Nieman and Frank Lloyd Parks devised a scheme to defraud a number of individuals of sums of money in excess of $5,000. The indictment charged all six defendants with conspiracy in violation of 18 U.S.C. 371 and charged each of them with a varying number of substantive counts based on six separate alleged fraudulent transactions involving alleged violations of 18 U.S.C. 1343 (use of the wires to defraud); 18 U.S.C. 1341 (mail fraud); and 18 U.S.C. 2314 (inducing interstate travel in execution of a fraud and interstate transportation of the proceeds of a fraud).

The basic charge was that the defendants, operating through a corporation called Colombia Resources Ltd., created a scheme to defraud by representing to various businessmen seeking loans that the corporation was in a position to obtain mortgage money for them, and in furtherance of the scheme prepared a false financial statement showing assets in excess of $27 million. On the basis of these and other asserted false representations, the defendants, it was further charged, obtained advance fees from the persons seeking the mortgage money.

Two defendants, Nieman and Lonardo, pleaded guilty in advance of trial, and Nieman testified as the government's principal witness. All of the remaining defendants were convicted on some of the counts. Petitioner was convicted on ten of the twenty-nine counts in which he was charged and received a three-year concurrent sentence under 18 U.S.C. 4208(a) on each of the counts.

The evidence at the trial disclosed that petitioner had been retained by Nieman as the attorney for Colombia Resources, and that in each of the transactions in which he was named as a defendant, prepared the various legal documents and agreements which were required. The evidence further disclosed that Crisona had not been a party to either the creation of the fraudulent balance sheet or its submission to Dunn and Bradstreet as a basis for a favorable credit rating.

The petitioner took the stand in his own defense. He testified that in all of the transactions in which he had been involved, he acted exclusively as a lawyer and had been "taken in" by Nieman (who had a long record of fraud and "confidence" type convictions).

Apart from the testimony given by Nieman and the evidence concerning the improper cashing of a check not directly related to any of the allegedly fraudulent transactions, the only evidence against petitioner consisted of the testimony of the representatives of four of the concerns which had paid advance fees as to certain statements made to them by petitioner which, the prosecutor argued, were false or misleading.

The only seriously damaging witness among these was Richard Crake, also an attorney, from San Francisco. He

testified that he represented the Sunrise Mountain Corporation in its efforts to obtain mortgage financing through Colombia Resources and that he dealt extensively with petitioner in connection with these efforts during the period from December, 1965 to January, 1966.

Near the close of his direct testimony, Crake testified that while in New York in mid-January in an effort to finalize the transaction, he had several conversations with petitioner —the last of which, on January 18, he recorded on tape. The tape was then introduced into evidence (8a, 9a-13a)* and played to the jury (8a, 9a-13a).**

Thereafter, defense counsel learned from an examination of a prior statement of Crake produced pursuant to 18 U.S.C. 3500 that Crake had taped other telephone conversations between himself and petitioner and he called for their production. The trial judge denied the request, ruling that they were producible neither under 18 U.S.C. 3500, *Brady* v. *Maryland*, 373 U.S. 83 (1963), or Rule 16 of the Federal Rules of Criminal Procedure. With regard to Rule 16, the trial court seemed to rule that the tapes, taken as they were during the alleged commission of the crime, were not "statements" within the meaning of Rule 16(a).

On appeal, the Second Circuit disagreed. It ruled that the tapes were "statements" within the meaning of Rule 16(a), and that the trial court erred in holding that they were non-producible.

---

* Page references followed by the suffix "a" are to petitioner's appendix to his brief in the Court below. Those preceded by "TM" are to the transcribed trial minutes.

** It was replayed for the jury during the prosecutor's summation, the prosecutor arguing that petitioner's voice "reeked of guilt" and that his evasiveness was the "hallmark of a con man" (TM 2579-2580).

Although noting that "the usefulness of such statements should ordinarily be assessed by defense counsel rather than by us," and stating that it expects "that that will be the procedure in the future," the court below nevertheless found that the error did not warrant reversal of the conviction. In reaching this conclusion, it pointed to two factors: (1) that it had closely examined the *transcripts* of the tapes and found that ". . . they contain no information which could reasonably have been additionally useful to the defense," and (2) that ". . . the cumulative evidence of defendants' guilt adduced at trial was very substantial indeed." In support of its position, the court cited two cases: *Rosenberg* v. *United States,* 360 U.S. 367 (1959) and *United States* v. *Annunziato,* 293 F.2d 373, 381-2 (2d Cir.), cert. denied, 368 U.S. 919 (1961).

## Reasons for Granting the Writ

**The decision below raises an important question of federal law which should be decided by this court: whether, in light of *Alderman v. United States,* 394 U.S. 165, and *Dennis v. United States,* 384 U.S. 855, the erroneous withholding of "3500" material and the like from defense counsel at the trial should still be governed by a harmless error rule.**

This petition squarely raises an important and recurring issue in the administration of federal criminal justice: to wit, where material such as witness statements producible under 18 U.S.C. 3500 or defendants' statements producible under Rule 16(a), F.R.Cr.P.,* are found on appeal to have

* In this case, the material in question, tapes and transcripts of conversations between the petitioner and the government witness, Crake, are a sort of a hybrid. Although held producible under Rule 16(a) as statements of the petitioner, they also contain statements of Crake which could have been the source of potential impeaching material *à la* 18 U.S.C. 3500.

been erroneously withheld from defense counsel at the trial, what is the appropriate action which the appellate court should take?

The federal circuit courts, guided in large measure by decisions of this Court such as *Rosenberg* v. *United States,* 360 U.S. 367 (1959), have almost without exception applied a harmless error test in determining whether the erroneous non-production of "3500" statements at the trial should result in a reversal of the conviction. See e.g. *United States* v. *Annunziato,* 293 F. 2d 373, 382 (2d Cir. 1961); *United States* v. *Allegrucci,* 299 F.2d 811, (3d Cir. 1962); *Moore* v. *United States,* 349 F.2d 963 (D.C. Cir. 1965); *Hayes* v. *United States,* 329 F.2d 209 (8th Cir.), cert denied, 377 U.S. 980 (1964).

More recently, this Court has decided two cases, *Dennis* v. *United States,* 384 U.S. 855, and *Alderman* v. *United States,* 394 U.S. 165, which, although not directly on point, raise serious doubts as to the continued vitality of the *Rosenberg* harmless error rule.

In *Dennis,* the Court, without saying a word about the harmless error test, reversed the convictions of a number of defendants solely because the trial court had erroneously refused to furnish certain government witnesses' prior grand jury testimony to defense counsel.

The Court, it is true, discussed the nature of the evidence in the case in dealing with the preliminary question as to whether the grand jury minutes should have been disclosed. However, once it found that a "particularized need" had been shown and production should have been ordered, it immediately concluded that the convictions would have to be reversed.

Its reasoning was that defense counsel was entitled to the witnesses' grand jury minutes "while those witnesses were available for cross-examination," *Dennis*, at p. 875, and that "[t]he determination of what may be useful to the defense can *properly* and *effectively* be made only by an advocate," *Id.* (emphasis added). The Court did not say that the convictions had to be reversed because the evidence was weak*, because more than one set of grand jury minutes had been withheld or because the minutes contained potentially valuable impeachment material.** This Court simply said it was reversing because defense counsel was entitled to have these materials, and was entitled to have them in connection with his cross-examination.

Then, just last Term, this Court decided *Alderman*, supra, 394 U.S. 164. There the Court was faced with the problem of establishing procedures for determining whether electronic eavesdropping conducted in violation of a defendant's Fourth Amendment rights had tainted any of the evidence which was used to convict him. The government pressed for a rule under which the electronic eavesdropping information would be first submitted to a trial judge for an *in camera* examination, and that the defendant would then be furnished with any material which would be "arguably relevant."

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* The Court did talk about the fact that *Dennis* was a conspiracy case, that such a prosecution "carries with it the inevitable risk of wrongful attribution of responsibility to one or more of the multiple defendants," and that "under these circumstances, it is especially important that the defense, the judge, and the jury should have the assurrance that the doors that may lead to the truth have been unlocked." *Dennis*, supra, at 873.

However, the instant case also involves a conspiracy and a purported co-conspirator as the government's principal witness.

** The Court's opinion is totally silent on the issue.

This Court rejected this proposal, holding instead that "surveillance records as to which petitioner has standing to object should be turned over to him without being screened *in camera* by the trial judge." The Court continued that:

> "Admittedly, there may be much learned from an electronic surveillance which ultimately contributes nothing to probative evidence. But winnowing this material from those items which might have made a substantial contribution to the case against a petitioner is a task which should not be entrusted wholly to the court in the first instance. It might be otherwise if the trial judge had only to place the transcript or other record of the surveillance alongside the record evidence and compare the two for textual or substantive similarities. Even that assignment would be difficult enough for the trial judge to perform unaided. But a good deal more is involved. An apparently innocent phrase, a chance remark, a reference to what appears to be a neutral person or event, the identity of a caller or the individual on the other end of a telephone, or even the manner of speaking or using words may have special significance to one who knows the more intimate facts of an accused's life. And yet that information may be wholly colorless and devoid of meaning to one less well acquainted with all relevant circumstances. Unavoidably, this is a matter of judgment, but in our view the task is too complex, and the margin for error too great, to rely wholly on the *in camera* judgment of the trial court to identify those records which might have contributed to the Government's case."

Petitioner submits that these two cases raise serious questions as to whether the harmless error rule should continue to be applicable to the erroneous withholding of "3500" and "Rule 16" statements from defense counsel at the trial.

Petitioner contends that the non-production of material potentially useful to the defense can never be harmless error because, as Mr. Justice Brennan pointed out in his dissenting opinion in *Rosenberg* v. *United States,* 360 U.S. at 375, "... it is impossible for a judge to be fully aware of all the possibilities for impeachment inhering in a prior statement. . . ." An appellate court, no matter how conscientious or thorough its search, cannot fill the shoes of a skillful defense attorney. And to attempt to speculate, as the panel did here, that defense counsel could not have made any use of the tapes which might have affected the result is to engage in a futile and misleading form of metaphysics.

Petitioner concedes that there are distinguishing features between the facts here and those present in *Alderman* and *Dennis.* However, this Court's automatic reversal for non-production of the witnesses' grand jury testimony in *Dennis* and its rejection of a rule which would allow the Court to make an initial screening of eavesdropping material in *Alderman* to determine whether any of the material was "arguably relevant" to the evidence introduced at trial raise substantial doubts as to the present vitality of the applicability of harmless error rule to the erroneous withholding from defense counsel of material to which he is entitled. This Court should here grant certiorari to consider this important question.

## CONCLUSION

**The petition for a Writ of Certiorari should be granted.**

Respectfully submitted,

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# APPENDIX

## Opinion and Judgment of the Court of Appeals

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

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Nos. 624, 625, 626, 627—September Term, 1968.

(Argued May 23, 1969 Decided September 25, 1969.)

Docket Nos. 33130, 33131, 33132, 33133

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UNITED STATES OF AMERICA,

*Appellee,*

—against—

FRANK CRISONA, ANTHONY DELYRA, JOHN DELYRA, and FRANK LLOYD PARKS,

*Defendants-Appellants.*

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Before:

LUMBARD, *Chief Judge,*
FEINBERG, *Circuit Judge,* and TIMBERS, *District Judge.**

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Appeals from convictions after a jury trial in the United States District Court for the Southern District of New York, Thomas F. Murphy, *J.*, for fraud and conspiracy to defraud in violation of 18 U.S.C. §§ 371, 1341, 1343, 2314. Affirmed.

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MAURICE EDELBAUM, New York, N. Y., *for appellant Crisona.*

JAMES M. LA ROSSA, New York, N. Y., *for Appellant Anthony DeLyra.*

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* Chief Judge of the District of Connecticut, sitting by designation.

JOSHUA N. KOPLOVITZ, New York, N. Y. (Koplovitz and Fabricant, on the brief), *for Appellant John DeLyra.*

EUGENE J. MORAN, New York, N. Y., *for Appellant Parks.*

JAMES D. ZIRIN, Assistant United States Attorney (Robert M. Morgenthau, United States Attorney for the Southern District of New York, Kevin J. McInerney, Elkan Abramowitz, Assistant United States Attorneys, on the brief), *for Appellee.*

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FEINBERG, *Circuit Judge*:

This appeal is from four judgments of conviction entered in the United States District Court for the Southern District of New York on December 11, 1968, after a four week trial before Thomas F. Murphy, *J.*, and a jury. Defendant Frank Crisona was found guilty on ten counts covering violation of the wire fraud statute, 18 U.S.C. § 1343, inducing interstate travel in execution of a fraud and interstate transportation of the proceeds of a fraud, 18 U.S.C. § 2314, and conspiracy, 18 U.S.C. § 371. Defendants Anthony and John DeLyra were found guilty on substantially similar counts and also on one count of mail fraud, 18 U.S.C. § 1341. Frank Lloyd Parks was convicted of a total of seven counts for wire and mail fraud, interstate travel in execution of a fraud, and conspiracy. The first three defendants were each sentenced to three years, and Parks to one year, imprisonment on all counts to run concurrently.

Prior to trial two other defendants, Dominic C. Lonardo and John Martin Neiman, pleaded guilty to one and 17 counts, respectively, and subsequently Neiman testified as a government witness.

## I. The Conspiracy

The indictment charged all four appellants, Neiman and Lonardo with conspiring to defraud and actually defrauding many individuals and corporations. While only Parks challenges the sufficiency of the voluminous evidence developed at trial, a summary of the numerous and complex financial dealings which underlie appellants' convictions is helpful in considering the various legal issues raised. The evidence introduced by the Government allowed a jury to find the following.

Crisona, a former Assistant District Attorney for Queens County, New York, first met Neiman, whom the Government aptly describes as a "professional confidence man with a long criminal record," in October 1964, when they engaged in a joint attempt to salvage financially a summer camp in which Crisona had an interest. The attempt failed, and the camp was lost, leaving Crisona $15,000 in debt to a loan shark, but the business association between the two men survived. In the summer of the following year, Neiman entered into negotiations with one William Sikora, a New Jersey real estate operator, to provide Sikora with a commitment for a $3,000,000 loan, and persuaded him to pay a security deposit of $10,000 in the form of a check made out to Crisona, as attorney, to be held in escrow pending the funding of the loan. Crisona promptly cashed the check and split up the proceeds between himself, Neiman and Crisona's loan shark. Ap-

parently during this period Crisona first met Anthony DeLyra, with whom Neiman had done business in the past, and Parks, a former stockbroker who used an office in the same building as John DeLyra. Anthony was introduced to Sikora as an individual who would advance sums for the latter's loan and Parks was presented to him as the stockbroker who was going to handle the financing. Evidently no loan was ever consummated.

In October 1965, Neiman and the DeLyras somehow came into possession of a stolen $9,200 cashier's check payable to a recently deceased woman named Mary McCarthy. Pursuant to Crisona's suggestion a joint checking account in the names of Mary McCarthy and a fictitious John O'Brien was opened in a branch of the Franklin National Bank and the check deposited in it. Within the next few days Crisona signed two checks in the name of John O'Brien for $5,600 and $3,500 and he and Neiman then cashed them at the bank and divided up the proceeds among themselves and the two DeLyras. The bank, however, discovered that Mary McCarthy was dead. The check was dishonored, and Crisona was notified that he would be held responsible for the $9,100 overdraft.

In November 1965, Neiman, Crisona and the DeLyras, who were apparently all in debt, and Parks, who was unemployed, devised their basic scheme of utilizing a foreign corporation owned by John DeLyra, Columbia Resources, Ltd., to issue real estate financing commitments. To make the corporation appear financially sound, they prepared a false financial statement showing a net worth of $11,000,000,[1] which was submitted to Dun and Bradstreet as

[1] This was later altered to show even greater worth.

a basis for a credit rating, along with false resumes of the backgrounds of four officers of Columbia, two of whom were pseudonyms for Neiman and Anthony DeLyra. Utilizing this false statement, and the excellent Dun and Bradstreet rating they eventually received, and variously presenting themselves as officers of the corporation, often under assumed names, the defendants thereafter used Columbia Resources as a front for obtaining advance fees from various individuals and corporations in return for letters of intent or commitments to secure real estate financing. In most instances the advance was presumably to be held in escrow by Crisona, as attorney, pending the funding of the loan, but was in fact immediately distributed among Neiman and the defendants. None of the Columbia loan financings was ever consummated.

The specific transactions of this nature which form the basis of the various counts on which appellants were indicted may be outlined briefly, as they all follow substantially the same pattern.

(1) *Kline.* In November 1965, Neiman was referred to a Boston real estate developer, Sydney Kline, to whom he sent a copy of the false financial statement and offered a commitment for a $700,000 first mortgage to finance a nursing home which Kline planned to construct. A man named Graeber, acting for Neiman, went to Boston and attempted to secure a two per cent standby fee or deposit from Kline in return for a commitment letter. At Graeber's suggestion Kline spoke on the telephone to Crisona, who assured him that Columbia was a reputable firm which he had often represented and that Kline's check for the advance fee would be held in escrow pending completion of the transac-

tion. Kline then wrote out a check for $13,500 to Crisona which Crisona, when he received it, promptly cashed and distributed among his colleagues.

In late December, a second commitment of $125,000 for another nursing home was arranged with Kline after a purported appraisal of the property by John DeLyra, under a false name, who elicited another standby fee check for $2,500 which was again supposed to be held in escrow. When Kline became suspicious of the lack of progress in the financing he called Crisona and asked for his money back, but was told that it had been turned over to Columbia.

(2) *Sunrise Mountain Corp.* In December 1965, Neiman made contact with A. Earle Brown, the owner of Sunrise Mountain, a development corporation which was in Chapter XI reorganization; Brown was seeking a $3,000,000 loan for a real estate project in Las Vegas. At initial meetings between Brown, Neiman—under an assumed name—and Crisona, it was agreed that Sunrise would pay a $30,000 standby fee to Columbia for a $3,000,000 loan commitment. Crisona assured Brown of the corporation's reliability and its ability, based on the false financial statement, to fund the loan. Subsequently, Brown and his attorney, Richard Crake, met with Crisona, Neiman and Parks, who was introduced as a Columbia officer who acted as a West Coast liaison man. Crisona again made assurances of his own and Columbia's respectability and it was agreed that out of the standby payment Crisona would receive a $7,500 attorney's fee with the balance being placed in escrow. As the date when the funding was scheduled drew near, however, Crisona persuaded Brown and Crake, who was co-escrowee with Crisona,

to release the escrow fund, finally assuring them that the closing of the funding would take place the same day. Crisona immediately deposited the escrow check and distributed the proceeds, using a portion of them to pay off the overdraft caused by the McCarthy-O'Brien transaction. He never showed up for the closing, which continued to be repeatedly postponed with a variety of excuses. During January 1966, Crake had a number of telephone conversations with Neiman, Crisona, and Parks, at least some of which he tape recorded. On January 19, Crake and Brown finally went to the office of the United States Attorney for the Eastern District of New York and requested an investigation of Columbia.

(3) *Tuller.* At approximately the same time, Neiman and Anthony DeLyra, again using false names, obtained a check for $8,500, in return for a letter of intent to obtain a $850,000 loan for a Julliard Tullar of Silver Springs, Maryland. As usual, the closing of the loan was repeatedly delayed and as a result, the mortgage on Tuller's property was foreclosed at a loss of $300,000.

(4) *Menlove.* In February 1966, Parks and Neiman persuaded Roy Menlove, a Salt Lake City motel owner, to put up an advance fee of $11,000 for a prospective $1,100,000 loan by Columbia, after Parks had conducted an "appraisal" of Menlove's property and Menlove had been furnished a copy of the Dun and Bradstreet report based on the false financial statement on Columbia. The loan closing was twice adjourned and never took place.

(5) *Fazio.* In return for a letter of intent to provide a $1,500,000 loan for a motel, a Mr. Fazio in Cleveland gave Neiman a check for $11,500 on account. The loan was not funded.

(6) *Howard Rome.* In April 1966, after negotiations between Neiman, Parks, John DeLyra, Crisona and a Howard Rome in Cleveland, it was agreed to arrange a $1,350,000 loan for Rome with a $13,500 advance fee. Once again these negotiations involved an "appraisal" by Parks, false financial information, aliases and a variety of lies about the identity and experience of purported Columbia Resources executives. Crisona dissuaded Rome from putting the advance in escrow and it was divided among various participants.

(7) *Indianapolis.* In July 1966, Neiman and John DeLyra persuaded Morris Mitchell and Ary Infante, Indianapolis businessmen, to advertise that their company had funds available for loans and to refer prospective customers to Columbia in return for 25 per cent of advance fees collected. Over the following weeks Neiman and the two DeLyras collected a total of $19,000 in advance fees from customers so recruited.

Defendant Crisona testified in his own behalf that he had acted exclusively as a lawyer in the transactions with which he was involved, that in effect he was innocently misled by Neiman and that he never intended to defraud anyone or knowingly made any false representations. By its verdict the jury clearly discredited this testimony. Defendant Parks testified that he was unaware of the fraudulent nature of the enterprises and that the appraisals he conducted were done in good faith. Neither of the DeLyras took the witness stand.

On appeal, defendants jointly and separately raise a number of claims of error in the proceedings below. In addition, appellant Parks attacks the sufficiency of the evidence against

him. We will discuss these various arguments in turn; as will be seen, we find none of them persuasive.

II. Failure to Turn Over Tape Recordings

Crisona's main argument on appeal, adopted by all of the other defendants insofar as applicable to them, relates to the district court's refusal to order the Government to turn over to the defense tape recordings made by Crake, the lawyer in the Sunrise Mountain Corporation transaction, of various telephone conversations. Crake testified about one such conversation, held on January 18, 1966, in which Crisona told Crake that the $7,500 advance fee had been turned over to Columbia Resources, reassured him that the corporation was "legitimate," and described to him some of the other successful "deals" by Columbia on which Crisona had worked. Toward the end of Crake's direct testimony, he identified a tape, which was subsequently received in evidence and played to the jury, as a recording of this January 18 telephone conversation. Crake also recorded a number of other telephone conversations including several with Crisona and Neiman and Parks. Crake turned these tapes over to the F.B.I., but none was introduced at trial except for the one of the January 18 conversation. At trial, defense counsel called for the production of all of the tapes, basing their request alternatively on 18 U.S.C. §3500, Rule 16 of the Federal Rules of Criminal Procedure, and the doctrine of *Brady* v. *Maryland*, 373 U.S. 83 (1963). The trial judge denied disclosure of the tapes on all three grounds, and all are raised here on appeal. Defense counsel also asked the judge to listen to the tapes himself or to mark and seal them as

a court exhibit for appellate review, but he declined both suggestions.

1. *Section 3500*

Appellants' first argument is that the tapes should have been turned over to the defense under the provisions of the Jencks Act, 18 U.S.C. §3500:

> (a) In any criminal prosecution brought by the United States, no statement or report in the possession of the United States which was made by a Government witness . . . to an agent of the Government shall be the subject of subpena, discovery, or inspection until said witness has testified on direct examination in the trial of the case.
>
> (b) After a witness called by the United States has testified on direct examination, the court shall, on motion of the defendant, order the United States to produce any statement (as hereinafter defined) of the witness in the possession of the United States which relates to the subject matter as to which the witness has testified.

Under subsection (e) the term "statement" as used in subsection (b) is defined as:

> (1) a written statement made by said witness and signed or otherwise adopted or approved by him; or
>
> (2) a stenographic, mechanical, electrical, or other recording, or a transcription thereof, which is a substantially verbatim recital of an oral statement made by said witness to an agent of the Government and recorded contemporaneously with the making of such oral statement.

The court below declined to order the tapes turned over to defense counsel under section 3500. The apparent ground

for the ruling was that Crake had not testified about any recorded conversation other than the one on January 18—the transcript and tape of which were turned over since the Government introduced them into evidence—and there was no showing that the remaining tapes related to the subject matter of the direct testimony. We need not consider the correctness of this restrictive interpretation of section 3500(b), see *United States* v. *Birnbaum*, 337 F. 2d 490, 497-98 (2d Cir. 1964), since we find that the tapes were not "statements" within the meaning of the Jencks Act. The tapes of these telephone conversations do not come within subsection (e)(2) as they are not recordings of oral statements made to a government agent. Nor, as appellant Anthony DeLyra contends, are the recordings and the transcripts made from them "in effect" a written statement under subsection (e)(1).

Our decision in *United States* v. *Birnbaum, supra,* is not inconsistent with this analysis. There we upheld the refusal of the trial judge to turn over to the defense tape recordings of two conversations between the defendant, indicated for bribing an Internal Revenue agent, and a government witness. While we noted that "[t]here is no dispute that the transcripts [of the recorded conversations] are 'statements' within the meaning of subsection (e) of the Act," 337 F. 2d at 497, that dictum was based on circumstances in which the recordings were made at the direction of the F.B.I. with the specific objective "to garner evidence of appellant's complicity in the bribery scheme." *Id.* at 498. In the factual situation there present the statements of witnesses might reasonably be construed as being made "to an agent of the Government." Indeed, there is

authority for interpreting the Jencks Act not to apply at all to the sort of pre-investigatory communications involved in this case. Thus, the Seventh Circuit, upholding a refusal to turn over to the defense a contemporaneous tape recording of a conversation between the payer and the recipient of a bribe—witness and defendant, respectively—in a subsequent prosecution for extortion, has defined Jencks Act material succinctly:

> A § 3500 statement is a recorded recital of past occurrences made by a prospective prosecution witness. From its very nature, necessarily it is made after those events have taken place.

*United States* v. *Sopher*, 362 F. 2d 523, 525 (7th Cir.), cert. denied, 385 U.S. 928 (1966). Cf. *Battaglia* v. *United States*, 349 F. 2d 556, 560 (9th Cir.), cert. denied, 382 U.S. 955 (1965). We need not now decide whether we would similarly limit the scope of material obtainable under the Act in an appropriate case, although our dictum in *Birnbaum* clearly looks the other way. It is sufficient for the purposes of this appeal that the telephone conversations of witness Crake were in no sense "to an agent of the Government."[2]

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[2] The record indicates that at one point during the trial counsel for defendant Parks speculated that Crake, since he had been to see the United States Attorney in Brooklyn, might have been acting at the latter's direction in taping the conversations and thus "as an agent" of the Government. The trial judge suggested that counsel could readily ascertain that fact by asking either that government attorney or Crake. Counsel did not pursue the matter further on the record. In any event, it is clear that Crake began taping the conversations before he visited the United States Attorney and there is nothing in the record to indicate that he continued to do so by virtue of governmental instructions.

2. *Rule 16(a)*

Appellants next contend that the tapes or transcripts should have been produced under Fed. R. Crim. P. 16(a):

> Upon motion of a defendant the court may order the attorney for the government to permit the defendant to inspect and copy or photograph any relevant (1) written or recorded statements or confessions made by the defendant, or copies thereof, within the possession, custody or control of the government, the existence of which is known, or by the exercise of due diligence may become known to the attorney for the government . . . .

The trial judge denied such a request on the theory that the section does not cover statements made by a defendant prior to arrest.[3] On appeal the Government vigorously defends that ruling, contending that "statements or confessions" under Rule 16(a) do not include pre-arrest statements made by a defendant during the course of the commission of a crime. The question has divided trial judges; the authorities were collected most recently by Judge Frankel in the Southern District of New York in a thorough opinion. *United States* v. *Rosenberg*, 299 F. Supp. 1241 (S.D.N.Y. 1969). While noting that the judges of that district had reached different conclusions on the subject, he concluded that tape recordings taken of conversations in which the defendant allegedly offered an Internal Revenue agent bribes were clearly "state-

[3] Before the trial, Judge Mansfield denied a similar Rule 16(a) motion by Anthony and John DeLyra on the ground that a recording made at the time of an offense is not a statement under 16(a). *United States* v. *Crisona*, 271 F. Supp. 150, 157 and n. 15 (S.D.N.Y. 1967), modified in unpublished memorandum, Jan. 10, 1968.

ments" under Rule 16(a) and discoverable by defendant. For similar district court rulings, see, e.g., *United States* v. *Lubomski*, 277 F. Supp. 713, 719-22 (N.D. Ill. 1967); *United States* v. *Iovinelli*, 276 F. Supp. 629, 630-31 (N.D. Ill. 1967); *United States* v. *Leighton*, 265 F. Supp. 27, 34 (S.D.N.Y. 1967); cf. *United States* v. *Baker*, 262 F. Supp. 657, 671-72 (D. D.C. 1966). The bases of these decisions have been that the language of amended Rule 16(a) is unqualified in contrast to the limited definition of "statement" in section 3500, that the Notes of the Advisory Committee indicate that the amended Rule was intended to apply even to pre-arrest statements made by a defendant during the course of his crime and was meant to broaden materially the scope of discovery available to a defendant,[4] that such a statement is obviously of such vital importance to the defense that fairness compels its disclosure, and that guilty pleas will thereby be encouraged. This broad interpretation of "statement" in Rule 16(a) is supported by the recent recommendation of the ABA Project on Minimum Standards for Criminal Justice, Standards Relating to Discovery and Procedure Before Trial 62 (1969) that a defendant receive before trial all of his statements

> regardless of to whom they were made—whether a prosecuting attorney, an investigator, a grand jury . . . , or anyone else. It is also intended that statements be discoverable regardless of how they are obtained, whether surreptitiously or voluntarily.

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[4] In amending the Rule in 1966, the Advisory Committee noted that:

> The defendant is not required to designate because he may not always be aware that his statements or confessions are being recorded. . . . Discovery of statements and confessions is in line with what the Supreme Court has described as the "better practice" (Cicenia v. LaGay, 357 U.S. 504, 511 (1958)) . . . .

We agree with these conclusions and see nothing in the plain language of Rule 16(a) or the Notes of the Advisory Committee accompanying it which would justify imposing the limitation suggested by the Government. See *United States* v. *Knohl*, 379 F.2d 427, 441-42 (2d Cir.), cert. denied, 389 U.S. 973 (1967) (dictum).

Having concluded that the tapes of defendants' conversations are "statements" under Rule 16(a), we must still decide whether failure to turn them over was reversible error. The Government points out that the language of the section is not mandatory—"the court *may* order the attorney for the government" (emphasis added)—and indeed this has been the focus of another dispute in the district courts over what showing of need, if any, a defendant must make in the ordinary case to compel inspection of his statement. E.g., compare *United States* v. *Projansky*, 44 F.R.D. 550 (S.D.N.Y. 1968), with *United States* v. *Louis Carreau, Inc.*, 42 F.R.D. 408 (S.D.N.Y. 1967). We note that weighty scholarly authority supports the proposition that withholding a defendant's statement should be the exception, not the rule, subject to the court's power to impose a protective order when appropriate. See ABA Project on Minimum Standards for Criminal Justice, Standards Relating to Discovery and Procedure Before Trial 52-53, 58-61 (1969); 8 Moore, Federal Practice ¶16.05[1] (2d ed. 1969). However, we need not discuss that issue more fully because the trial judge here ruled as a matter of law—not of discretion—that the tapes did not qualify as statements.

On the facts of the present case, however, we hold that the trial judge's failure to compel disclosure of the tape

recordings under Rule 16(a) was not reversible error. Aside from the one recorded conversation to which Crake testified and which was played to the jury, a transcript of which was furnished the defense, none of the others was introduced in evidence. While none of the latter tapes was otherwise made available to the defendants, we have closely examined the transcripts[5] of the tapes and find that they contain no information which could reasonably have been additionally useful to the defense. Moreover, we note that the cumulative evidence of defendants' guilt adduced at trial was very substantial indeed. In sum, while the tape recordings of conversations of defendants were "statements" under Rule 16(a), we find that the court's failure to make them available was not in fact harmful.[6] Cf. *Rosenberg* v. *United States*, 360 U.S. 367 (1959); *United States* v. *Annunziato*, 293 F. 2d 373, 381-82 (2d Cir.), cert. denied, 368 U.S. 919 (1961). We are well aware that the usefulness of such statements should ordinarily be assessed by defense counsel rather than by us, and we expect that that will be the procedure in the future. In any event, we will apply the interpretation of Rule 16(a) that we adopt here to all motions made thereunder after this opinion is filed.

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[5] These have been furnished to us by the Government, and we are lodging them with the Clerk of the Court in a sealed envelope pending further review, if any, of the case.

[6] We put to one side the fact that counsel for Parks did not specifically request the tapes at trial. We note that it was not clear at trial that conversations with Parks had been recorded; that information is disclosed by the transcripts of the tapes.

3. *Brady* v. *Maryland*

The third ground of alleged error involving the tapes is based on the doctrine of *Brady* v. *Maryland,* 373 U.S. 83 (1963), under which the prosecution is required to turn over to the defense any material evidence in its possession which is favorable to the accused. Although the prosecution below represented to the trial judge that there was no exculpatory or contradictory information in the tapes, defendants maintained that the trial judge should himself listen to the tapes in order to determine whether the defense was entitled to obtain them in the interest of justice. The trial judge declined to do so, and appellants argue that a government prosecutor cannot be expected to be able to make a meaningful evaluation of what material may be useful to defense counsel and that, at the least, possibly useful material should be objectively reviewed by the trial judge. We realize that the problem is a real one which has been the subject of substantial discussion. See, e.g., ABA Project on Minimum Standards for Criminal Justice, Standards Relating to Discovery and Procedure Before Trial 73-78 (1969); Note, The Prosecutor's Constitutional Duty to Reveal Evidence to the Defendant, 74 Yale L.J. 136, 147-49 (1964). However, appellants themselves concede the lack of any precedent for such a procedure, and indeed, this court has very recently restated the present legal principle that, with certain limited exceptions not here applicable, "the assurance by the government that it has in its possession no undisclosed evidence that would tend to exculpate defendant justifies the denial of a motion for inspection that does not make some particularized showing

of materiality and usefulness." *United States* v. *Evanchik*, F. 2d , (2d Cir. July 16, 1969). The request here was for a known item—tapes of conversations to which one or more defendants were parties; the record below discloses no such particularized showing of need; and as we have already noted, we have examined the transcript of the tapes and found it to contain nothing that would have been additionally useful to the defense.

### III. The McCarthy-O'Brien Transaction

Appellants' next argument is that evidence about the fraudulent bank account established with the check of the deceased Mary McCarthy, introduced over their objections, should have been excluded because its probative value was far outweighed by its prejudicial effect. In addition, they object to the Government's introduction of false grand jury testimony by Crisona relating to the transaction and cross-examination in which Crisona repeatedly contradicted that testimony. The Government contends, on the other hand, that the check episode was admissible to show motive for appellants' subsequent conduct, i.e., proceeds from the Sunrise Mountain Corporation fraud were needed and used to pay off the $9,100 overdraft created when the McCarthy check was stopped. Secondly, the Government justifies the introduction of the transaction and Crisona's grand jury testimony about it as relevant to Crisona's credibility.

It has been this court's "consistently held position that evidence of similar acts, including other crimes, is admissible for any relevant purpose other than merely to show defendant's bad character." *United States* v. *Johnson*,

382 F. 2d 280, 281 (2d Cir. 1967). We do not think that the substantial and pressing financial obligation arising from the transaction is of insignificant probative value on the issue of appellants' motivation for their subsequent frauds. Cf. *United States* v. *Kahaner,* 317 F. 2d 459, 470-72 (2d Cir.), cert. denied, 375 U.S. 836 (1963). Nor are we impressed by the magnitude of the prejudicial impact of what appellant Crisona terms "the repulsive tale as to the theft of the dead woman's check" in the context of appellants' numerous other financial misappropriations. Cf. *United States* v. *Bradwell,* 388 F. 2d 619, 622 (2d Cir.), cert. denied, 393 U.S. 867 (1968); *United States* v. *Jordan,* 399 F. 2d 610, 612-13 (2d Cir.), cert. denied, 393 U.S. 1005 (1968). Moreover, it was the defendants themselves who, on cross-examination of government witness Neiman, brought out the "repulsive" aspects of the affair—that the check was stolen and that Mary McCarthy was dead. Finally, the trial judge took pains in his instructions to the jury to limit the effect of the evidence. Appellants rely heavily on the decision of this court in *United States* v. *Byrd,* 352 F. 2d 570 (2d Cir. 1965). But we have made clear that *Byrd* itself only "reiterated that where the pertinent factors have been duly considered, the admissibility of the evidence is a matter in which the trial judge should be allowed a wide range of discretion." *United States* v. *Deaton,* 381 F. 2d 114, 118 n. 3 (2d Cir. 1967). Assessing the "pertinent factors" here involved, we do not think that the trial judge abused his discretion.

## IV. Failure to Rule in Advance on Defendants' Convictions

Appellant John DeLyra contends that the trial judge erred in refusing to make an advance ruling with regard to the admissibility for impeachment purposes of certain prior convictions. During a recess on a Friday near the end of the Government's case, the attorney for both John and Anthony DeLyra informed the judge that he was "contemplating the possibility" that either or both would testify but that he understood that both had been convicted of crimes 25 or more years before; he requested the court to rule whether it would allow the Government to bring out the convictions if the defendants were to testify. The following Monday the trial judge declined to make such an advance ruling. On appeal, we are told that John DeLyra had been convicted of vagrancy and of petit larceny in 1935, and that between 1937 and 1940 he was charged with concealment of leased property, for which he was ultimately fined $300.[7] Appellant, relying largely on this court's decision in *United States* v. *Palumbo*, 401 F. 2d 270 (2d Cir. 1968), cert. denied, 394 U.S. 947 (1969), argues that these ancient and relatively minor convictions should not have been available to the Government to impeach his credibility and that the trial judge had discretion to prevent such use and should have so ruled before appellant decided whether to take the stand.

It is true that *Palumbo* stands for the proposition that a trial judge has discretion to exclude evidence of prior crimes in an appropriate case and to decide to do so in advance of defendant's testifying. However, while such a practice may

[7] Anthony DeLyra apparently does not press this claim of error on appeal; in any event, our disposition of it would be the same.

sometimes be desirable, *Palumbo* does not suggest, as appellant would have us rule, that it is necessarily error for the judge to defer exercising that discretion until the defendant has in fact testified. Indeed, in *Palumbo* itself, we stressed that the trial judge has discretion in this area, see 401 F. 2d at 274, and we have subsequently approved a district court's discretionary refusal to make advisory rulings in similar circumstances. See *United States* v. *Evanchik*, —— F. 2d —— (2d Cir. July 16, 1969); *United States* v. *Hart*, 407 F. 2d 1087, 1088-89 (2d Cir. 1969). Under these circumstances, we hold that there was no abuse of discretion in the trial judge's failure to make an anticipatory ruling.

## V. Objections to Jury Instructions

### 1. *Charge on intent*

Appellant Anthony DeLyra contends that the trial judge, in instructing the jury, failed to make clear that the element of criminal intent must have been proved as to each of the charges beyond a reasonable doubt. In charging on the many different counts, the judge repeatedly included intent or knowledge as one of the elements which the Government had to establish beyond a reasonable doubt as to each offense. Immediately after the charge, defense counsel took exception to the court's failure specifically to instruct the jury on the elements of wilfulness and knowledge. Consequently, the judge then gave the supplemental charge:

> Ladies and gentlemen, I am told that in my charge in explaining the counts . . . that I called the wire crimes and travel crimes and the transport-money-by-fraud crimes, I neglected to tell you one of the elements that the government must prove with regard to each

> defendant accused in those crimes is that he did the act complained of knowingly and wilfully; and that means that he had to have an evil intent at the time of the alleged crime; not something that he did negligently or accidentally but purposefully. In other words, he had a criminal intent when he is alleged to have committed these crimes.

Appellant apparently argues that the court should have again stated that this element of the crime had to be proved beyond a reasonable doubt. In view of the judge's prior instructions, this was unnecessary. Indeed, defendants made no further objection. Cf. *United States* v. *Indiviglio*, 352 F. 2d 276 (2d Cir. 1965) (*en banc*), cert. denied, 383 U.S. 907 (1966).

2. *Missing witness charge*

Appellant John DeLyra raises as error the trial judge's instruction on missing witnesses. In his summation counsel for Crisona several times called attention to the failure of the Government to summon certain individuals as witnesses; in reply, the prosecuting attorney noted that the defense could have obtained the presence of witnesses by subpoena. In his jury charge, the trial judge commented:

> During summations there was considerable reference to where a certain witness was and to the fact that he wasn't called. In a federal criminal trial both the government and a defendant are entitled to receive from the clerk of the court a subpoena calling for the attendance of a witness, and no matter where the witness lives in the United States, he is required to appear when served with such a subpoena.
>
> Now, X or Y or Z could have been called by either side as a witness, so that from the failure of either

> side to call him or them you may infer that his or their testimony might have been unfavorable to either the government or to a defendant, but it is equally within your discretion to draw no inference at all from the failure of the government or a defendant to call X or Y or Z.

Appellant argues that allowing the jury to draw an unfavorable inference from his failure to call a witness infringes upon his right to rest upon the Government's burden of proof. But we have long held that it is proper to instruct the jury that "the failure to produce such a witness is open to an inference against either party." *United States* v. *Dibrizzi*, 393 F. 2d 642, 646 (2d Cir. 1968); see *United States* v. *Armone*, 363 F. 2d 385, 404-05 (2d Cir.), cert. denied, 385 U.S. 957 (1966); *United States* v. *Evanchik*, *supra*, F. 2d at . Additionally, appellant argues that this charge is only permissible where the witness is "equally available" to both sides, that the power to subpoena does not establish "equal availability," and that in fact the witnesses referred to were not "as a practical matter" available to the defendant. We noted in *United States* v. *Armone*, *supra*, 363 F. 2d at 405, that "[i]f the court had stated that a witness was available who was not, in fact, available, a different picture might have been presented," but defendant made no assertion either below or here on appeal that any specific individual was unavailable to him. Indeed, no exception whatever was taken to the charge, which is sufficient in itself to be dispositive. See *United States* v. *Indiviglio*, *supra*. In sum, we find no merit in appellants' objection to the charge.

## VI. Improper Juror Discussions

Shortly before the charge, counsel for the DeLyras represented to the judge that there had been improper discussions among the jurors. Rose DeLyra, sister-in-law of the DeLyras, then testified that a few days before she had heard three female jurors discussing the case in the ladies' room and that one of them had said "He's guilty," and another, "If you ask me they're all guilty." Mrs. DeLyra said she could identify with certainty only one of the women and was uncertain who had said what. Counsel for the DeLyras requested an inquiry of the jurors and the trial judge agreed that he would conduct one. Subsequently the judge did confer *in camera* with each of the four female jurors and a female alternate juror, and stated that he was satisfied that there was no basis in fact for Mrs. DeLyra's testimony. On appeal, John DeLyra claims that the judge should have conducted a hearing in open court on the matter with defense counsel present. However, there is no indication that any defense counsel ever requested such a hearing, objected to the judge's course of action, or even took exception to his conclusion. Consequently there is no merit to appellant's contention. See *United States* v. *Kahaner*, 317 F. 2d 459, 482-83 (2d Cir.), cert. denied, 375 U.S. 836 (1963). Moreover, the procedure adopted by the judge seems to have been reasonable under the circumstances. See *Miller* v. *United States*, 403 F. 2d 77, 81-82 (2d Cir. 1968); cf. *United States* v. *Woodner*, 317 F. 2d 649, 651-52 (2d Cir.), cert. denied, 375 U.S. 903 (1963).

## VII. Sufficiency of the Evidence Against Parks

The main argument of appellant Parks is that the evidence against him was insufficient to support his conviction, and that there was no showing that he knowingly participated in the illegal schemes or had any motive for such a participation. Taking the evidence, as we must, from the view most favorable to the Government, we find sufficient grounds on which the jury could reasonably have reached its conclusion as to appellant's guilt. To summarize the most important facts: Parks was present at meetings among the conspirators at which the details of the scheme were planned and carried out; he received substantial shares of the proceeds of fraudulently obtained advance fees; he presented himself, or was presented, to various victims under aliases and in false capacities and made a variety of misrepresentations to these victims about Columbia Resources. In the light of his intimate and prolonged connection with the other defendants and their illegal enterprise it is not surprising that the jury found unpersuasive his assertion that he was merely an innocent dupe.

Parks raises a second claim of error relating to an allegedly prejudicial line of questioning by the trial judge about certain written appraisal records, but we find it wholly without merit.

Judgments affirmed.

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IN THE

# Supreme Court of the United States

**OCTOBER TERM 1969**

No. 981

JOHN DELYRA,

*Petitioner,*

—against—

UNITED STATES OF AMERICA,

*Respondent.*

## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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IN THE

# Supreme Court of the United States

**October Term 1969**

No.

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JOHN DELYRA,

*Petitioner,*

—against—

UNITED STATES OF AMERICA,

*Respondent.*

---

## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioner John DeLyra respectfully prays that a writ of certiorari issue to review judgment of the United States Court of Appeals for the Second Circuit entered in this proceeding on September 25, 1969.

### Opinion Below

The opinion of the Court of Appeals, reported at 416 F.2d 107, appears in the Appendix hereto. No opinion was rendered by the District Court for the Southern District of New York.

### Jurisdiction

The judgment of the Court of Appeals for the Second Circuit was entered on September 25, 1969. A timely petition for rehearing and/or rehearing *en banc* was denied on October 24, 1969.

Thereafter, on November 15, 1969, Mr. Justice Harlan signed an order extending the time within which to file the petition up to and including December 23, 1969. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

## Question Presented

1. Whether a federal district court has the power, in the exercise of its discretion, to bar a federal prosecutor from using a defendant's prior conviction to impeach his credibility should he testify; and if so, whether the defendant is entitled to a ruling on this question in advance of his taking the stand.

## Statutes Involved

*Rule 26, F.R.Cr.P. Evidence*

In all trials, the testimony of witnesses shall be taken orally in open court, unless otherwise provided by an act of Congress or by these rules. The admissibility of evidence and the competency and privileges of witnesses shall be governed, except when an act of Congress or these rules otherwise provide, by the principles of the common law as they may be interpreted by the courts of the United States in the light of reason and experience.

## Statement of the Case

Petitioner was charged, along with five co-defendants, in a thirty-count indictment with conspiracy, mail fraud, wire fraud, interstate travel, and inducing interstate travel in execution of a fraudulent scheme. Two of the defendants, Nieman

and Lonardo, pleaded guilty; and petitioner and the remaining three defendants were convicted after trial. Petitioner received a three-year prison sentence on each of several counts, the sentences to run concurrently.

The indictment charged the defendants with a scheme to defraud businessmen seeking mortgage money by representing that Colombia Resources Ltd., a company which they controlled, could obtain the desired financing; and with obtaining "advance" fees from these businessmen by means of certain fraudulent misrepresentations.

The petitioner did not testify. However, during a recess near the end of the government's case, counsel for petitioner and his brother, Anthony DeLyra, informed the trial judge that he was "contemplating the possibility"* that either or both of his clients would testify; that petitioner had a prior criminal record, but that it consisted of two petty misdemeanors, the most recent of which occurred approximately twenty-five years ago; and that it was not "directly related to this type of situation." Relying upon the recent Second Circuit decision of *United States* v. *Palumbo,* 401 F.2d 270 (2d Cir. 1968),** counsel then requested the trial judge to rule whether he would allow the government to bring out petitioner's conviction if he were to testify.

The trial judge deferred ruling on the request at that time, but on the next trial day, he announced that he had read the *Palumbo* case and "I will not make an advance ruling."

The trial then proceeded, with petitioner not testifying.

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* See petitioner's brief in the court below (p. 29-30).

** That decision had held that a trial judge had the discretion to exclude a defendant's prior conviction in an appropriate case and to do so in advance of defendant's testifying.

On appeal, petitioner claimed that the trial judge's refusal to give an "advance" ruling as to whether he would permit the prosecutor to use petitioner's remote prior convictions to impeach his credibility if he took the stand constituted an erroneous failure to exercise his judicial discretion.

The court below, in affirming, disagreed. It conceded that "*Palumbo* stood for the proposition that a trial judge has discretion to exclude evidence of prior crimes in an appropriate case and *to decide to do so in advance of defendant's testifying*" (20a) (emphasis supplied). However, it went on to say that ". . . while such practice may sometime be desirable, *Palumbo* does not suggest . . . that it is necessarily error for the judge to defer exercising that discretion until the defendant has in fact testified" (20a-21a).

## Reasons for Granting the Writ

**The court below has decided an important question of federal law which should be settled by this court: whether federal district courts should have the discretionary power to prohibit the prosecutor from using a defendant's prior convictions to impeach him should he testify, and if so, whether the defendant has the right to a ruling in advance of his having to take the stand.**

There presently exists within the federal circuits a serious split as to whether federal district courts may, under appropriate circumstances, prohibit the prosecutor from impeaching a defendant by means of a prior conviction. The courts of appeals in the D.C. and Second Circuits have held that they may. See *Luck* v. *United States*, 348 F.2d 763 (D.C. Cir. 1965); *United States* v. *Palumbo*, 401 F.2d 270 (2d Cir.) cert. denied, 394 U.S. 947 (1969).

A number of other circuits have specifically ruled to the contrary, adhering to the "orthodox or conventional rule" which does not permit any "balancing of factors" by the district court. *Burg* v. *United States,* 406 F.2d 235 (9th Cir. 1969); *United States* v. *Plata,* 361 F.2d 958, 962 (7th Cir. 1966); *Smith* v. *United States,* 358 F.2d 683 (3d Cir. 1966); *Montgomery* v. *United States,* 403 F.2d 605, 611 (8th Cir. 1968).

There has been an apparent growing uneasiness that impeachment of a defendant through the use of his prior convictions not only casts doubt upon his credibility, "but also may result in casting such an atmosphere of aspersion and disrepute about the defendant as to convince the jury that he is an habitual law-breaker who should be punished and confined for the general good of the community." *Richards* v. *United States,* 192 F.2d 602, 605 (D.C. Cir. 1951). See Griswold, *The Long View,* 51 A.B.A. Journal 1017.

Rule 6-09 of the Preliminary Draft of the Proposed Rules of Evidence for the United States District Courts and Magistrates, 46 F.R.D. 161 at 295-301, contains a proposed rule which purports to deal with this problem. However, when this rule or a modification thereof will be adopted as law is uncertain; and in the meantime, continued adherence by a majority of the circuits to the orthodox rule creates unreasonable barriers to the defendants in those circuits with prior convictions who wish to testify in their own behalf.

Although there are, at present, no congressional acts or federal rules applicable to the question under discussion, this Court need not be bound by the common law orthodox rule automatically allowing impeachment in every case, See Rule 26, F.R.Cr.P.

This Court clearly has the right, in the exercise of its supervisory power over the lower federal courts, to consider whether there should be circumstances under which a prosecutor, in the interests of insuring the defendant a fair trial, should not be allowed to impeach the defendant by means of a prior conviction; and in that connection whether the defendant should be able to obtain an advance ruling* from the trial judge as to whether the impeachment will be allowed prior to the defendant taking the stand.

The defendant's right to testify at his own trial is undeniably a part of due process. It is also undeniable that many defendants pass up the opportunity of testifying in their own defense because of the fear that the disclosure of their prior criminal record to the jury will more than offset any good which their testimony might accomplish. See Kalven and Zeisel, *The American Jury* 124, 126-130, 144-146 (1966).

It is finally undeniable that the orthodox rule entitles the prosecutor, as a matter of right, to use, in impeaching, convictions which because of their age or the nature of the crime committed bear insignificant relationship to the relevant issue of credibility but unmistakeably prejudice the defendant in the eyes of the jury. Because of these factors, the Court should, by granting certiorari in this case, take up the important questions here raised.

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* This, as petitioner argued in the court below, is critical, for if the exercise of discretion is deferred until after a defendant has testified, few, if any, defendants who normally would not testify because of their prior convictions would take the gamble that the trial court, after hearing their testimony, would then choose to bar any impeachment.

## CONCLUSION

**The Petition for a Writ of Certiorari should be granted.**

Respectfully submitted,

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# APPENDIX

## Opinion and Judgment of the Court of Appeals

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Nos. 624, 625, 626, 627—September Term, 1968.

(Argued May 23, 1969 Decided September 25, 1969.)

Docket Nos. 33130, 33131, 33132, 33133

UNITED STATES OF AMERICA,

*Appellee,*

—against—

FRANK CRISONA, ANTHONY DELYRA, JOHN DELYRA, and FRANK LLOYD PARKS,

*Defendants-Appellants.*

Before:

LUMBARD, *Chief Judge,*
FEINBERG, *Circuit Judge,* and TIMBERS, *District Judge.**

Appeals from convictions after a jury trial in the United States District Court for the Southern District of New York, Thomas F. Murphy, *J.*, for fraud and conspiracy to defraud in violation of 18 U.S.C. §§ 371, 1341, 1343, 2314. Affirmed.

MAURICE EDELBAUM, New York, N. Y., *for appellant Crisona.*

JAMES M. LA ROSSA, New York, N. Y., *for Appellant Anthony DeLyra.*

* Chief Judge of the District of Connecticut, sitting by designation.

JOSHUA N. KOPLOVITZ, New York, N. Y. (Koplovitz and Fabricant, on the brief), *for Appellant John DeLyra.*

EUGENE J. MORAN, New York, N. Y., *for Appellant Parks.*

JAMES D. ZIRIN, Assistant United States Attorney (Robert M. Morgenthau, United States Attorney for the Southern District of New York, Kevin J. McInerney, Elkan Abramowitz, Assistant United States Attorneys, on the brief), *for Appellee.*

---

FEINBERG, *Circuit Judge*:

This appeal is from four judgments of conviction entered in the United States District Court for the Southern District of New York on December 11, 1968, after a four week trial before Thomas F. Murphy, *J.*, and a jury. Defendant Frank Crisona was found guilty on ten counts covering violation of the wire fraud statute, 18 U.S.C. § 1343, inducing interstate travel in execution of a fraud and interstate transportation of the proceeds of a fraud, 18 U.S.C. § 2314, and conspiracy, 18 U.S.C. § 371. Defendants Anthony and John DeLyra were found guilty on substantially similar counts and also on one count of mail fraud, 18 U.S.C. § 1341. Frank Lloyd Parks was convicted of a total of seven counts for wire and mail fraud, interstate travel in execution of a fraud, and conspiracy. The first three defendants were each sentenced to three years, and Parks to one year, imprisonment on all counts to run concurrently.

Prior to trial two other defendants, Dominic C. Lonardo and John Martin Neiman, pleaded guilty to one and 17 counts, respectively, and subsequently Neiman testified as a government witness.

## I. The Conspiracy

The indictment charged all four appellants, Neiman and Lonardo with conspiring to defraud and actually defrauding many individuals and corporations. While only Parks challenges the sufficiency of the voluminous evidence developed at trial, a summary of the numerous and complex financial dealings which underlie appellants' convictions is helpful in considering the various legal issues raised. The evidence introduced by the Government allowed a jury to find the following.

Crisona, a former Assistant District Attorney for Queens County, New York, first met Neiman, whom the Government aptly describes as a "professional confidence man with a long criminal record," in October 1964, when they engaged in a joint attempt to salvage financially a summer camp in which Crisona had an interest. The attempt failed, and the camp was lost, leaving Crisona $15,000 in debt to a loan shark, but the business association between the two men survived. In the summer of the following year, Neiman entered into negotiations with one William Sikora, a New Jersey real estate operator, to provide Sikora with a commitment for a $3,000,000 loan, and persuaded him to pay a security deposit of $10,000 in the form of a check made out to Crisona, as attorney, to be held in escrow pending the funding of the loan. Crisona promptly cashed the check and split up the proceeds between himself, Neiman and Crisona's loan shark. Ap-

parently during this period Crisona first met Anthony DeLyra, with whom Neiman had done business in the past, and Parks, a former stockbroker who used an office in the same building as John DeLyra. Anthony was introduced to Sikora as an individual who would advance sums for the latter's loan and Parks was presented to him as the stockbroker who was going to handle the financing. Evidently no loan was ever consummated.

In October 1965, Neiman and the DeLyras somehow came into possession of a stolen $9,200 cashier's check payable to a recently deceased woman named Mary McCarthy. Pursuant to Crisona's suggestion a joint checking account in the names of Mary McCarthy and a fictitious John O'Brien was opened in a branch of the Franklin National Bank and the check deposited in it. Within the next few days Crisona signed two checks, in the name of John O'Brien for $5,600 and $3,500 and he and Neiman then cashed them at the bank and divided up the proceeds among themselves and the two DeLyras. The bank, however, discovered that Mary McCarthy was dead. The check was dishonored, and Crisona was notified that he would be held responsible for the $9,100 overdraft.

In November 1965, Neiman, Crisona and the DeLyras, who were apparently all in debt, and Parks, who was unemployed, devised their basic scheme of utilizing a foreign corporation owned by John DeLyra, Columbia Resources, Ltd., to issue real estate financing commitments. To make the corporation appear financially sound, they prepared a false financial statement showing a net worth of $11,000,000,[1] which was submitted to Dun and Bradstreet as

[1] This was later altered to show even greater worth.

a basis for a credit rating, along with false resumes of the backgrounds of four officers of Columbia, two of whom were pseudonyms for Neiman and Anthony DeLyra. Utilizing this false statement, and the excellent Dun and Bradstreet rating they eventually received, and variously presenting themselves as officers of the corporation, often under assumed names, the defendants thereafter used Columbia Resources as a front for obtaining advance fees from various individuals and corporations in return for letters of intent or commitments to secure real estate financing. In most instances the advance was presumably to be held in escrow by Crisona, as attorney, pending the funding of the loan, but was in fact immediately distributed among Neiman and the defendants. None of the Columbia loan financings was ever consummated.

The specific transactions of this nature which form the basis of the various counts on which appellants were indicted may be outlined briefly, as they all follow substantially the same pattern.

(1) *Kline.* In November 1965, Neiman was referred to a Boston real estate developer, Sydney Kline, to whom he sent a copy of the false financial statement and offered a commitment for a $700,000 first mortgage to finance a nursing home which Kline planned to construct. A man named Graeber, acting for Neiman, went to Boston and attempted to secure a two per cent standby fee or deposit from Kline in return for a commitment letter. At Graeber's suggestion Kline spoke on the telephone to Crisona, who assured him that Columbia was a reputable firm which he had often represented and that Kline's check for the advance fee would be held in escrow pending completion of the transac-

tion. Kline then wrote out a check for $13,500 to Crisona which Crisona, when he received it, promptly cashed and distributed among his colleagues.

In late December, a second commitment of $125,000 for another nursing home was arranged with Kline after a purported appraisal of the property by John DeLyra, under a false name, who elicited another standby fee check for $2,500 which was again supposed to be held in escrow. When Kline became suspicious of the lack of progress in the financing he called Crisona and asked for his money back, but was told that it had been turned over to Columbia.

(2) *Sunrise Mountain Corp.* In December 1965, Neiman made contact with A. Earle Brown, the owner of Sunrise Mountain, a development corporation which was in Chapter XI reorganization; Brown was seeking a $3,000,000 loan for a real estate project in Las Vegas. At initial meetings between Brown, Neiman—under an assumed name—and Crisona, it was agreed that Sunrise would pay a $30,000 standby fee to Columbia for a $3,000,000 loan commitment. Crisona assured Brown of the corporation's reliability and its ability, based on the false financial statement, to fund the loan. Subsequently, Brown and his attorney, Richard Crake, met with Crisona, Neiman and Parks, who was introduced as a Columbia officer who acted as a West Coast liaison man. Crisona again made assurances of his own and Columbia's respectability and it was agreed that out of the standby payment Crisona would receive a $7,500 attorney's fee with the balance being placed in escrow. As the date when the funding was scheduled drew near, however, Crisona persuaded Brown and Crake, who was co-escrowee with Crisona,

to release the escrow fund, finally assuring them that the closing of the funding would take place the same day. Crisona immediately deposited the escrow check and distributed the proceeds, using a portion of them to pay off the overdraft caused by the McCarthy-O'Brien transaction. He never showed up for the closing, which continued to be repeatedly postponed with a variety of excuses. During January 1966, Crake had a number of telephone conversations with Neiman, Crisona, and Parks, at least some of which he tape recorded. On January 19, Crake and Brown finally went to the office of the United States Attorney for the Eastern District of New York and requested an investigation of Columbia.

(3) *Tuller.* At approximately the same time, Neiman and Anthony DeLyra, again using false names, obtained a check for $8,500, in return for a letter of intent to obtain a $850,000 loan for a Julliard Tullar of Silver Springs, Maryland. As usual, the closing of the loan was repeatedly delayed and as a result, the mortgage on Tuller's property was foreclosed at a loss of $300,000.

(4) *Menlove.* In February 1966, Parks and Neiman persuaded Roy Menlove, a Salt Lake City motel owner, to put up an advance fee of $11,000 for a prospective $1,100,000 loan by Columbia, after Parks had conducted an "appraisal" of Menlove's property and Menlove had been furnished a copy of the Dun and Bradstreet report based on the false financial statement on Columbia. The loan closing was twice adjourned and never took place.

(5) *Fazio.* In return for a letter of intent to provide a $1,500,000 loan for a motel, a Mr. Fazio in Cleveland gave Neiman a check for $11,500 on account. The loan was not funded.

(6) *Howard Romé.* In April 1966, after negotiations between Neiman, Parks, John DeLyra, Crisona and a Howard Rome in Cleveland, it was agreed to arrange a $1,350,000 loan for Rome with a $13,500 advance fee. Once again these negotiations involved an "appraisal" by Parks, false financial information, aliases and a variety of lies about the identity and experience of purported Columbia Resources executives. Crisona dissuaded Rome from putting the advance in escrow and it was divided among various participants.

(7) *Indianapolis.* In July 1966, Neiman and John DeLyra persuaded Morris Mitchell and Ary Infante, Indianapolis businessmen, to advertise that their company had funds available for loans and to refer prospective customers to Columbia in return for 25 per cent of advance fees collected. Over the following weeks Neiman and the two DeLyras collected a total of $19,000 in advance fees from customers so recruited.

Defendant Crisona testified in his own behalf that he had acted exclusively as a lawyer in the transactions with which he was involved, that in effect he was innocently misled by Neiman and that he never intended to defraud anyone or knowingly made any false representations. By its verdict the jury clearly discredited this testimony. Defendant Parks testified that he was unaware of the fraudulent nature of the enterprises and that the appraisals he conducted were done in good faith. Neither of the DeLyras took the witness stand.

On appeal, defendants jointly and separately raise a number of claims of error in the proceedings below. In addition, appellant Parks attacks the sufficiency of the evidence against

him. We will discuss these various arguments in turn; as will be seen, we find none of them persuasive.

II. Failure to Turn Over Tape Recordings

Crisona's main argument on appeal, adopted by all of the other defendants insofar as applicable to them, relates to the district court's refusal to order the Government to turn over to the defense tape recordings made by Crake, the lawyer in the Sunrise Mountain Corporation transaction, of various telephone conversations. Crake testified about one such conversation, held on January 18, 1966, in which Crisona told Crake that the $7,500 advance fee had been turned over to Columbia Resources, reassured him that the corporation was "legitimate," and described to him some of the other successful "deals" by Columbia on which Crisona had worked. Toward the end of Crake's direct testimony, he identified a tape, which was subsequently received in evidence and played to the jury, as a recording of this January 18 telephone conversation. Crake also recorded a number of other telephone conversations including several with Crisona and Neiman and Parks. Crake turned these tapes over to the F.B.I., but none was introduced at trial except for the one of the January 18 conversation. At trial, defense counsel called for the production of all of the tapes, basing their request alternatively on 18 U.S.C. §3500, Rule 16 of the Federal Rules of Criminal Procedure, and the doctrine of *Brady* v. *Maryland*, 373 U.S. 83 (1963). The trial judge denied disclosure of the tapes on all three grounds, and all are raised here on appeal. Defense counsel also asked the judge to listen to the tapes himself or to mark and seal them as

a court exhibit for appellate review, but he declined both suggestions.

1. *Section 3500*

Appellants' first argument is that the tapes should have been turned over to the defense under the provisions of the Jencks Act, 18 U.S.C. §3500:

> (a) In any criminal prosecution brought by the United States, no statement or report in the possession of the United States which was made by a Government witness . . . to an agent of the Government shall be the subject of subpena, discovery, or inspection until said witness has testified on direct examination in the trial of the case.
>
> (b) After a witness called by the United States has testified on direct examination, the court shall, on motion of the defendant, order the United States to produce any statement (as hereinafter defined) of the witness in the possession of the United States which relates to the subject matter as to which the witness has testified.

Under subsection (e) the term "statement" as used in subsection (b) is defined as:

> (1) a written statement made by said witness and signed or, otherwise adopted or approved by him; or
>
> (2) a stenographic, mechanical, electrical, or other recording, or a transcription thereof, which is a substantially verbatim recital of an oral statement made by said witness to an agent of the Government and recorded contemporaneously with the making of such oral statement.

The court below declined to order the tapes turned over to defense counsel under section 3500. The apparent ground

for the ruling was that Crake had not testified about any recorded conversation other than the one on January 18—the transcript and tape of which were turned over since the Government introduced them into evidence—and there was no showing that the remaining tapes related to the subject matter of the direct testimony. We need not consider the correctness of this restrictive interpretation of section 3500(b), see *United States* v. *Birnbaum,* 337 F. 2d 490, 497-98 (2d Cir. 1964), since we find that the tapes were not "statements" within the meaning of the Jencks Act. The tapes of these telephone conversations do not come within subsection (e)(2) as they are not recordings of oral statements made to a government agent. Nor, as appellant Anthony DeLyra contends, are the recordings and the transcripts made from them "in effect" a written statement under subsection (e)(1).

Our decision in *United States* v. *Birnbaum, supra,* is not inconsistent with this analysis. There we upheld the refusal of the trial judge to turn over to the defense tape recordings of two conversations between the defendant, indicated for bribing an Internal Revenue agent, and a government witness. While we noted that "[t]here is no dispute that the transcripts [of the recorded conversations] are 'statements' within the meaning of subsection (e) of the Act," 337 F. 2d at 497, that dictum was based on circumstances in which the recordings were made at the direction of the F.B.I. with the specific objective "to garner evidence of appellant's complicity in the bribery scheme." *Id.* at 498. In the factual situation there present the statements of witnesses might reasonably be construed as being made "to an agent of the Government." Indeed, there is

authority for interpreting the Jencks Act not to apply at all to the sort of pre-investigatory communications involved in this case. Thus, the Seventh Circuit, upholding a refusal to turn over to the defense a contemporaneous tape recording of a conversation between the payer and the recipient of a bribe—witness and defendant, respectively—in a subsequent prosecution for extortion, has defined Jencks Act material succinctly:

> A § 3500 statement is a recorded recital of past occurrences made by a prospective prosecution witness. From its very nature, necessarily it is made after those events have taken place.

*United States* v. *Sopher*, 362 F. 2d 523, 525 (7th Cir.), cert. denied, 385 U.S. 928 (1966). Cf. *Battaglia* v. *United States*, 349 F. 2d 556, 560 (9th Cir.), cert. denied, 382 U.S. 955 (1965). We need not now decide whether we would similarly limit the scope of material obtainable under the Act in an appropriate case, although our dictum in *Birnbaum* clearly looks the other way. It is sufficient for the purposes of this appeal that the telephone conversations of witness Crake were in no sense "to an agent of the Government."[2]

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[2] The record indicates that at one point during the trial counsel for defendant Parks speculated that Crake, since he had been to see the United States Attorney in Brooklyn, might have been acting at the latter's direction in taping the conversations and thus "as an agent" of the Government. The trial judge suggested that counsel could readily ascertain that fact by asking either that government attorney or Crake. Counsel did not pursue the matter further on the record. In any event, it is clear that Crake began taping the conversations before he visited the United States Attorney and there is nothing in the record to indicate that he continued to do so by virtue of governmental instructions.

2. *Rule 16(a)*

Appellants next contend that the tapes or transcripts should have been produced under Fed. R. Crim. P. 16(a):

> Upon motion of a defendant the court may order the attorney for the government to permit the defendant to inspect and copy or photograph any relevant (1) written or recorded statements or confessions made by the defendant, or copies thereof, within the possession, custody or control of the government, the existence of which is known, or by the exercise of due diligence may become known to the attorney for the government . . . .

The trial judge denied such a request on the theory that the section does not cover statements made by a defendant prior to arrest.[3] On appeal the Government vigorously defends that ruling, contending that "statements or confessions" under Rule 16(a) do not include pre-arrest statements made by a defendant during the course of the commission of a crime. The question has divided trial judges; the authorities were collected most recently by Judge Frankel in the Southern District of New York in a thorough opinion. *United States* v. *Rosenberg*, 299 F. Supp. 1241 (S.D.N.Y. 1969). While noting that the judges of that district had reached different conclusions on the subject, he concluded that tape recordings taken of conversations in which the defendant allegedly offered an Internal Revenue agent bribes were clearly "state-

[3] Before the trial, Judge Mansfield denied a similar Rule 16(a) motion by Anthony and John DeLyra on the ground that a recording made at the time of an offense is not a statement under 16(a). *United States* v. *Crisona*, 271 F. Supp. 150, 157 and n. 15 (S.D.N.Y. 1967), modified in unpublished memorandum, Jan. 10, 1968.

ments'' under Rule 16(a) and discoverable by defendant. For similar district court rulings, see, e.g., *United States* v. *Lubomski*, 277 F. Supp. 713, 719-22 (N.D. Ill. 1967); *United States* v. *Iovinelli*, 276 F. Supp. 629, 630-31 (N.D. Ill. 1967); *United States* v. *Leighton*, 265 F. Supp. 27, 34 (S.D.N.Y. 1967); cf. *United States* v. *Baker*, 262 F. Supp. 657, 671-72 (D. D.C. 1966). The bases of these decisions have been that the language of amended Rule 16(a) is unqualified in contrast to the limited definition of ''statement'' in section 3500, that the Notes of the Advisory Committee indicate that the amended Rule was intended to apply even to pre-arrest statements made by a defendant during the course of his crime and was meant to broaden materially the scope of discovery available to a defendant,[4] that such a statement is obviously of such vital importance to the defense that fairness compels its disclosure, and that guilty pleas will thereby be encouraged. This broad interpretation of ''statement'' in Rule 16(a) is supported by the recent recommendation of the ABA Project on Minimum Standards for Criminal Justice, Standards Relating to Discovery and Procedure Before Trial 62 (1969) that a defendant receive before trial all of his statements

> regardless of to whom they were made—whether a prosecuting attorney, an investigator, a grand jury . . . , or anyone else. It is also intended that statements be discoverable regardless of how they are obtained, whether surreptitiously or voluntarily.

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[4] In amending the Rule in 1966, the Advisory Committee noted that:

> The defendant is not required to designate because he may not always be aware that his statements or confessions are being recorded. . . . Discovery of statements and confessions is in line with what the Supreme Court has described as the "better practice" (Cicenia v. LaGay, 357 U.S. 504, 511 (1958)) . . . .

We agree with these conclusions and see nothing in the plain language of Rule 16(a) or the Notes of the Advisory Committee accompanying it which would justify imposing the limitation suggested by the Government. See *United States* v. *Knohl*, 379 F.2d 427, 441-42 (2d Cir.), cert. denied, 389 U.S. 973 (1967) (dictum).

Having concluded that the tapes of defendants' conversations are "statements" under Rule 16(a), we must still decide whether failure to turn them over was reversible error. The Government points out that the language of the section is not mandatory—"the court *may* order the attorney for the government" (emphasis added)—and indeed this has been the focus of another dispute in the district courts over what showing of need, if any, a defendant must make in the ordinary case to compel inspection of his statement. E.g., compare *United States* v. *Projansky*, 44 F.R.D. 550 (S.D.N.Y. 1968), with *United States* v. *Louis Carreau, Inc.*, 42 F.R.D. 408 (S.D.N.Y. 1967). We note that weighty scholarly authority supports the proposition that withholding a defendant's statement should be the exception, not the rule, subject to the court's power to impose a protective order when appropriate. See ABA Project on Minimum Standards for Criminal Justice, Standards Relating to Discovery and Procedure Before Trial 52-53, 58-61 (1969); 8 Moore, Federal Practice ¶16.05[1] (2d ed. 1969). However, we need not discuss that issue more fully because the trial judge here ruled as a matter of law—not of discretion—that the tapes did not qualify as statements.

On the facts of the present case, however, we hold that the trial judge's failure to compel disclosure of the tape

recordings under Rule 16(a) was not reversible error. Aside from the one recorded conversation to which Crake testified and which was played to the jury, a transcript of which was furnished the defense, none of the others was introduced in evidence. While none of the latter tapes was otherwise made available to the defendants, we have closely examined the transcripts[5] of the tapes and find that they contain no information which could reasonably have been additionally useful to the defense. Moreover, we note that the cumulative evidence of defendants' guilt adduced at trial was very substantial indeed. In sum, while the tape recordings of conversations of defendants were "statements" under Rule 16(a), we find that the court's failure to make them available was not in fact harmful.[6] Cf. *Rosenberg* v. *United States*, 360 U.S. 367 (1959); *United States* v. *Annunziato*, 293 F. 2d 373, 381-82 (2d Cir.), cert. denied, 368 U.S. 919 (1961). We are well aware that the usefulness of such statements should ordinarily be assessed by defense counsel rather than by us, and we expect that that will be the procedure in the future. In any event, we will apply the interpretation of Rule 16(a) that we adopt here to all motions made thereunder after this opinion is filed.

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[5] These have been furnished to us by the Government, and we are lodging them with the Clerk of the Court in a sealed envelope pending further review, if any, of the case.

[6] We put to one side the fact that counsel for Parks did not specifically request the tapes at trial. We note that it was not clear at trial that conversations with Parks had been recorded; that information is disclosed by the transcripts of the tapes.

*3. Brady* v. *Maryland*

The third ground of alleged error involving the tapes is based on the doctrine of *Brady* v. *Maryland*, 373 U.S. 83 (1963), under which the prosecution is required to turn over to the defense any material evidence in its possession which is favorable to the accused. Although the prosecution below represented to the trial judge that there was no exculpatory or contradictory information in the tapes, defendants maintained that the trial judge should himself listen to the tapes in order to determine whether the defense was entitled to obtain them in the interest of justice. The trial judge declined to do so, and appellants argue that a government prosecutor cannot be expected to be able to make a meaningful evaluation of what material may be useful to defense counsel and that, at the least, possibly useful material should be objectively reviewed by the trial judge. We realize that the problem is a real one which has been the subject of substantial discussion. See, e.g., ABA Project on Minimum Standards for Criminal Justice, Standards Relating to Discovery and Procedure Before Trial 73-78 (1969); Note, The Prosecutor's Constitutional Duty to Reveal Evidence to the Defendant, 74 Yale L.J. 136, 147-49 (1964). However, appellants themselves concede the lack of any precedent for such a procedure, and indeed, this court has very recently restated the present legal principle that, with certain limited exceptions not here applicable, "the assurance by the government that it has in its possession no undisclosed evidence that would tend to exculpate defendant justifies the denial of a motion for inspection that does not make some particularized showing

of materiality and usefulness." *United States* v. *Evanchik*, F. 2d , (2d Cir. July 16, 1969). The request here was for a known item—tapes of conversations to which one or more defendants were parties; the record below discloses no such particularized showing of need; and as we have already noted, we have examined the transcript of the tapes and found it to contain nothing that would have been additionally useful to the defense.

### III. The McCarthy-O'Brien Transaction

Appellants' next argument is that evidence about the fraudulent bank account established with the check of the deceased Mary McCarthy, introduced over their objections, should have been excluded because its probative value was far outweighed by its prejudicial effect. In addition, they object to the Government's introduction of false grand jury testimony by Crisona relating to the transaction and cross-examination in which Crisona repeatedly contradicted that testimony. The Government contends, on the other hand, that the check episode was admissible to show motive for appellants' subsequent conduct, i.e., proceeds from the Sunrise Mountain Corporation fraud were needed and used to pay off the $9,100 overdraft created when the McCarthy check was stopped. Secondly, the Government justifies the introduction of the transaction and Crisona's grand jury testimony about it as relevant to Crisona's credibility.

It has been this court's "consistently held position that evidence of similar acts, including other crimes, is admissible for any relevant purpose other than merely to show defendant's bad character." *United States* v. *Johnson*,

382 F. 2d 280, 281 (2d Cir. 1967). We do not think that the substantial and pressing financial obligation arising from the transaction is of insignificant probative value on the issue of appellants' motivation for their subsequent frauds. Cf. *United States* v. *Kahaner*, 317 F. 2d 459, 470-72 (2d Cir.), cert. denied, 375 U.S. 836 (1963). Nor are we impressed by the magnitude of the prejudicial impact of what appellant Crisona terms "the repulsive tale as to the theft of the dead woman's check" in the context of appellants' numerous other financial misappropriations. Cf. *United States* v. *Bradwell*, 388 F. 2d 619, 622 (2d Cir.), cert. denied, 393 U.S. 867 (1968); *United States* v. *Jordan*, 399 F. 2d 610, 612-13 (2d Cir.), cert. denied, 393 U.S. 1005 (1968). Moreover, it was the defendants themselves who, on cross-examination of government witness Neiman, brought out the "repulsive" aspects of the affair—that the check was stolen and that Mary McCarthy was dead. Finally, the trial judge took pains in his instructions to the jury to limit the effect of the evidence. Appellants rely heavily on the decision of this court in *United States* v. *Byrd*, 352 F. 2d 570 (2d Cir. 1965). But we have made clear that *Byrd* itself only "reiterated that where the pertinent factors have been duly considered, the admissibility of the evidence is a matter in which the trial judge should be allowed a wide range of discretion." *United States* v. *Deaton*, 381 F. 2d 114, 118 n. 3 (2d Cir. 1967). Assessing the "pertinent factors" here involved, we do not think that the trial judge abused his discretion.

## IV. Failure to Rule in Advance on Defendants' Convictions

Appellant John DeLyra contends that the trial judge erred in refusing to make an advance ruling with regard to the admissibility for impeachment purposes of certain prior convictions. During a recess on a Friday near the end of the Government's case, the attorney for both John and Anthony DeLyra informed the judge that he was "contemplating the possibility" that either or both would testify but that he understood that both had been convicted of crimes 25 or more years before; he requested the court to rule whether it would allow the Government to bring out the convictions if the defendants were to testify. The following Monday the trial judge declined to make such an advance ruling. On appeal, we are told that John DeLyra had been convicted of vagrancy and of petit larceny in 1935, and that between 1937 and 1940 he was charged with concealment of leased property, for which he was ultimately fined $300.[7] Appellant, relying largely on this court's decision in *United States* v. *Palumbo,* 401 F. 2d 270 (2d Cir. 1968), cert. denied, 394 U.S. 947 (1969), argues that these ancient and relatively minor convictions should not have been available to the Government to impeach his credibility and that the trial judge had discretion to prevent such use and should have so ruled before appellant decided whether to take the stand.

It is true that *Palumbo* stands for the proposition that a trial judge has discretion to exclude evidence of prior crimes in an appropriate case and to decide to do so in advance of defendant's testifying. However, while such a practice may

[7] Anthony DeLyra apparently does not press this claim of error on appeal; in any event, our disposition of it would be the same.

sometimes be desirable, *Palumbo* does not suggest, as appellant would have us rule, that it is necessarily error for the judge to defer exercising that discretion until the defendant has in fact testified. Indeed, in *Palumbo* itself, we stressed that the trial judge has discretion in this area, see 401 F. 2d at 274, and we have subsequently approved a district court's discretionary refusal to make advisory rulings in similar circumstances. See *United States* v. *Evanchik*, —— F. 2d —— (2d Cir. July 16, 1969); *United States* v. *Hart*, 407 F. 2d 1087, 1088-89 (2d Cir. 1969). Under these circumstances, we hold that there was no abuse of discretion in the trial judge's failure to make an anticipatory ruling.

## V. Objections to Jury Instructions

### 1. *Charge on intent*

Appellant Anthony DeLyra contends that the trial judge, in instructing the jury, failed to make clear that the element of criminal intent must have been proved as to each of the charges beyond a reasonable doubt. In charging on the many different counts, the judge repeatedly included intent or knowledge as one of the elements which the Government had to establish beyond a reasonable doubt as to each offense. Immediately after the charge, defense counsel took exception to the court's failure specifically to instruct the jury on the elements of wilfulness and knowledge. Consequently, the judge then gave the supplemental charge:

> Ladies and gentlemen, I am told that in my charge in explaining the counts . . . that I called the wire crimes and travel crimes and the transport-money-by-fraud crimes, I neglected to tell you one of the elements that the government must prove with regard to each

> defendant accused in those crimes is that he did the act complained of knowingly and wilfully; and that means that he had to have an evil intent at the time of the alleged crime; not something that he did negligently or accidentally but purposefully. In other words, he had a criminal intent when he is alleged to have committed these crimes.

Appellant apparently argues that the court should have again stated that this element of the crime had to be proved beyond a reasonable doubt. In view of the judge's prior instructions, this was unnecessary. Indeed, defendants made no further objection. Cf. *United States* v. *Indiviglio*, 352 F. 2d 276 (2d Cir. 1965) (*en banc*), cert. denied, 383 U.S. 907 (1966).

2. *Missing witness charge*

Appellant John DeLyra raises as error the trial judge's instruction on missing witnesses. In his summation counsel for Crisona several times called attention to the failure of the Government to summon certain individuals as witnesses; in reply, the prosecuting attorney noted that the defense could have obtained the presence of witnesses by subpoena. In his jury charge, the trial judge commented:

> During summations there was considerable reference to where a certain witness was and to the fact that he wasn't called. In a federal criminal trial both the government and a defendant are entitled to receive from the clerk of the court a subpoena calling for the attendance of a witness, and no matter where the witness lives in the United States, he is required to appear when served with such a subpoena.
>
> Now, X or Y or Z could have been called by either side as a witness, so that from the failure of either

> side to call him or them you may infer that his or their testimony might have been unfavorable to either the government or to a defendant, but it is equally within your discretion to draw no inference at all from the failure of the government or a defendant to call X or Y or Z.

Appellant argues that allowing the jury to draw an unfavorable inference from his failure to call a witness infringes upon his right to rest upon the Government's burden of proof. But we have long held that it is proper to instruct the jury that "the failure to produce such a witness is open to an inference against either party." *United States* v. *Dibrizzi*, 393 F. 2d 642, 646 (2d Cir. 1968); see *United States* v. *Armone*, 363 F. 2d 385, 404-05 (2d Cir.), cert. denied, 385 U.S. 957 (1966); *United States* v. *Evanchik*, *supra*, F. 2d at . Additionally, appellant argues that this charge is only permissible where the witness is "equally available" to both sides, that the power to subpoena does not establish "equal availability," and that in fact the witnesses referred to were not "as a practical matter" available to the defendant. We noted in *United States* v. *Armone*, *supra*, 363 F. 2d at 405, that "[i]f the court had stated that a witness was available who was not, in fact, available, a different picture might have been presented," but defendant made no assertion either below or here on appeal that any specific individual was unavailable to him. Indeed, no exception whatever was taken to the charge, which is sufficient in itself to be dispositive. See *United States* v. *Indiviglio*, *supra*. In sum, we find no merit in appellants' objection to the charge.

VI. Improper Juror Discussions

Shortly before the charge, counsel for the DeLyras represented to the judge that there had been improper discussions among the jurors. Rose DeLyra, sister-in-law of the DeLyras, then testified that a few days before she had heard three female jurors discussing the case in the ladies' room and that one of them had said "He's guilty," and another, "If you ask me they're all guilty." Mrs. DeLyra said she could identify with certainty only one of the women and was uncertain who had said what. Counsel for the DeLyras requested an inquiry of the jurors and the trial judge agreed that he would conduct one. Subsequently the judge did confer *in camera* with each of the four female jurors and a female alternate juror, and stated that he was satisfied that there was no basis in fact for Mrs. DeLyra's testimony. On appeal, John DeLyra claims that the judge should have conducted a hearing in open court on the matter with defense counsel present. However, there is no indication that any defense counsel ever requested such a hearing, objected to the judge's course of action, or even took exception to his conclusion. Consequently there is no merit to appellant's contention. See *United States* v. *Kahaner*, 317 F. 2d 459, 482-83 (2d Cir.), cert. denied, 375 U.S. 836 (1963). Moreover, the procedure adopted by the judge seems to have been reasonable under the circumstances. See *Miller* v. *United States*, 403 F. 2d 77, 81-82 (2d Cir. 1968); cf. *United States* v. *Woodner*, 317 F. 2d 649, 651-52 (2d Cir.), cert. denied, 375 U.S. 903 (1963).

## VII. Sufficiency of the Evidence Against Parks

The main argument of appellant Parks is that the evidence against him was insufficient to support his conviction, and that there was no showing that he knowingly participated in the illegal schemes or had any motive for such a participation. Taking the evidence, as we must, from the view most favorable to the Government, we find sufficient grounds on which the jury could reasonably have reached its conclusion as to appellant's guilt. To summarize the most important facts: Parks was present at meetings among the conspirators at which the details of the scheme were planned and carried out; he received substantial shares of the proceeds of fraudulently obtained advance fees; he presented himself, or was presented, to various victims under aliases and in false capacities and made a variety of misrepresentations to these victims about Columbia Resources. In the light of his intimate and prolonged connection with the other defendants and their illegal enterprise it is not surprising that the jury found unpersuasive his assertion that he was merely an innocent dupe.

Parks raises a second claim of error relating to an allegedly prejudicial line of questioning by the trial judge about certain written appraisal records, but we find it wholly without merit.

Judgments affirmed.

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376-878—70

# In the Supreme Court of the United States

OCTOBER TERM, 1969

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No. 966

FRANK LLOYD PARKS, PETITIONER

*v.*

UNITED STATES OF AMERICA

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No. 980

FRANK CRISONA, PETITIONER

*v.*

UNITED STATES OF AMERICA

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No. 981

JOHN DELYRA, PETITIONER

*v.*

UNITED STATES OF AMERICA

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*ON PETITION FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT*

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## BRIEF FOR THE UNITED STATES IN OPPOSITION

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### OPINION BELOW

The opinion of the court of appeals is reported at 416 F. 2d 107 (C.A. 2).

## JURISDICTION

The judgment of the court of appeals was entered on September 25, 1969. A petition for rehearing on behalf of all the petitioners was denied on October 24, 1969. Mr. Justice Harlan extended the time for filing petitions for writs of certiorari on behalf of all of the petitioners until December 23, 1969. Park's petition was filed on December 18, 1969, and those of J. DeLyra and Crisona on December 20, 1969. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

## QUESTIONS PRESENTED

1. Whether, after determining that the district court should have required disclosure of certain recordings a lawyer for one victim of a fraud made of his conversations with co-defendants, the court of appeals was correct in concluding, after an *in camera* examination, that the nondisclosure was harmless error.

2. Whether the district court abused its discretion in failing to rule in advance on petitioner John DeLyra's objection to the use of certain prior convictions to impeach his credibility.

## RULE INVOLVED

Rule 16(a) F.R. Crim. P.:

> (a) *Defendant's Statements; Reports of Examinations and Tests; Defendant's Grand Jury Testimony.* Upon motion of a defendant the court may order the attorney for the government to permit the defendant to inspect and

> copy or photograph any relevant (1) written or recorded statements or confessions made by the defendant, or copies thereof, within the possession, custody or control of the government, the existence of which is known, or by the exercise of due diligence may become known, to the attorney for the government * * *.

## STATEMENT

After a jury trial in the United States District Court for the Southern District of New York, Frank L. Parks was convicted of 7 counts, John DeLyra[1] of 13 counts and Frank Crisona of 10 counts charging violations of various federal fraud statutes and conspiracy. Crisona and DeLyra were sentenced to imprisonment for concurrent terms of 3 years and Parks to concurrent terms of 1 year's imprisonment (Pet. App. 1a–25a).

As appears from the opinion below, the evidence showed that petitioners and others offered to provide real estate financing through a corporate shell which they had made to appear financially sound through a credit rating fraudulently obtained from Dun & Bradstreet.[2] They charged clients an advance fee, usually several thousand dollars, and represented that the fee

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[1] Another defendant, Anthony DeLyra, filed a petition which has been separately answered. No. 870, this Term.

[2] To give the corporation an appearance of financial substance, petitioners drew up a fraudulent balance sheet listing nonexistent assets (Tr. 1161–1165) under the name of a fictitious certified public accountant supplied by petitioner John DeLyra (Tr. 1150–1151). This false financial statement was submitted to Dun & Bradstreet for a favorable credit rating (Tr. 1165–1166), which was then obtained.

was being placed in an escrow account; in reality, it was immediately divided among the members of the scheme. The corporation, Columbia Resources, Ltd. ("Colombia"), never obtained any financing for its clients, and never returned the advance fees. There was specific testimony as to a number of loans.

1. The first fraud petitioners perpetrated through Colombia occurred in November, 1965. A Boston real estate developer, Sydney Kline, was induced by John Martin Neiman [3] to pay $13,500 as an advance fee in return for a letter of commitment to finance a nursing home (Tr. 1170–1174, 566). Kline paid the fee after speaking with petitioner Crisona, who assured him that Colombia was a reputable firm (Tr. 1177). Kline obtained a second commitment for a nursing home in December, 1965, after petitioner John DeLyra, under the name "Mr. Camera" (Tr. 1284), purported to appraise the property (Tr. 571–574, 1187–1188). This time, the advance fee Kline had to pay was $2,500 (Tr. 1188). The funds collected were promptly divided among all the petitioners (Tr. 1179–1181).

2. In December, 1965, Neiman, Crisona and Anthony DeLyra approached Julliard Tuller, who was trying to refinance his debts. They offered to negotiate a loan (Tr. 861–868). After collecting $8,500 from Tuller as an advance fee (Tr. 867), they repeatedly postponed the financing of the loan (Tr. 873–881). When Tuller's mortgage was foreclosed, he was unable to find them (Tr. 882–884).

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[3] John Martin Neiman pleaded guilty to the charges against him and testified as a government witness at petitioners' trial.

3. In February, 1966, petitioner Parks falsely represented himself as an appraiser to Roy Menlove in Salt Lake City, who was seeking a loan for his motel (Tr. 819). Parks inspected the property (Tr. 821) and said that Colombia would be able to finance the loan, showing him its Dun & Bradstreet rating (Tr. 820–822, 853–854, 1166). Parks wrote a favorable appraisal of the property (Tr. 825). Again an advance fee was submitted, in the amount of $11,000, and divided among petitioners (Tr. 826–828, 1279–1280). Parks postponed the closing date for the loan several times (Tr. 829–833). The loan, in fact, was never negotiated.

4. In March, 1966, a similar arrangement was made with a Mr. Fazio of Cleveland, who remitted and lost an advance fee of $11,500 (Tr. 1264–1265; 1300–1301).

5. In April, 1966, the petitioners met Howard Rome in Fazio's office (Tr. 400). Parks told Rome that he was the vice-president in charge of appraisals (Tr. 416). In order to persuade Rome to remit an advance fee, Crisona produced the Dun & Bradstreet rating (Tr. 423–426). After the fee was paid (Tr. 425–428) and had been divided (Tr. 1254), Rome received a report from Dun & Bradstreet stating that it had discovered that Colombia was a corporate shell headed by Neiman, a man with a long criminal record (Tr. 438–439). Crisona admitted to Rome that he knew of Neiman's criminal record and his aliases

(Tr. 439, 1381–1401). Crisona also stated that he had resigned from Colombia (Tr. 442).

6. In June, 1966, two partners, Morris Mitchell and Ary Infante, were induced to take ads in local papers stating that they had a source for funds (Tr. 1028–1029, 1040). Both De Lyras and Neiman collected the advance fees from customers who answered the ads (Tr. 1030–1059). Crisona was listed as the attorney on all the commitments except one (Tr. 1097).

7. In December 1965, Neiman, using the assumed name "S. P. Williams," contacted A. Earle Brown, the owner of Sunrise Mountain Corporation,[4] concerning a three million dollar loan which Brown was attempting to secure. (Tr. 1196–1197, 32, 281–282, 288). After several meetings at which Parks was introduced as a Colombia officer and West Coast liaison man (Tr. 49–50, 238–241), Brown agreed with Neiman and Crisona to pay $30,000 as a standby fee for the loan commitment (Tr. 33–36, 311–313, 1198–1199). Crisona was paid $7,500 out of the $30,000 as an attorney's fee and the remainder was deposited in escrow (Tr. 36, 41–43, 50, 314–317, 1203–1204). Brown's attorney, Richard Crake, was then persuaded to release the amount in escrow on assurances that it was needed to finalize the funding (Tr. 63–65, 1205). This money was then divided among petitioners (Tr. 1208, 1214–1218). The date for completing the financing was originally set for around December 20, 1965, but was postponed by

[4] Sunrise Mountain Corporation was in the process of Chapter XI reorganization.

Colombia throughout December and into January, despite Brown's eagerness to obtain the funds (Tr. 51, 319, 68, 89). The loan was never secured (Tr. 68).

At trial, Crake testified to the substance of a telephone conversation between himself and Crisona on January 18, 1966 (Tr. 90–94). In the conversation, Crake expressed skepticism as to the good faith of the officers of Colombia and as to the probability of funding (Tr. 91). In turn, Crisona repeatedly assured Crake that the corporation was legitimate and enumerated several of the allegedly successful business ventures concluded by Colombia (Tr. 91–92). Crisona also mentioned that the $7,500 he had received as an attorney's fee had been turned over to Colombia; that this fee would be returned to him (Crisona) by Colombia in a day or two; and that he expected the loan to be finalized shortly (Tr. 91). At the conclusion of Crake's direct testimony, the jury was allowed to hear a recording made by Crake at the time of the conversation and to use a transcript of the recording as an aid (Tr. 96, 114).

An F.B.I. report of an interview with Crake indicated that Crake had recorded other conversations with representatives of Colombia Resources (Tr. 98–99). On cross-examination, Crake testified that he recorded other conversations with Crisona during the three-day period he was in New York in January. He stated that he had since turned these recordings over to the government (Tr. 158–159). He also testified that he recorded a conference call with "Williams" (Neiman) and a judge of a bankruptcy court (Tr. 161–167). He turned these tapes over to the

F.B.I. (Tr. 160). No further testimony regarding the content of the tape recordings was elicited at trial.

Counsel for Crisona, subsequently joined by counsel for all the petitioners, sought production of all the tapes Crake had made (Tr. 98–108, 169–180, 275–276, 1270–1278). The claim was based alternatively on 18 U.S.C. 3500, on Rule 16 of the Federal Rules of Criminal Procedure, and on the doctrine of *Brady* v. *Maryland,* 373 U.S. 83. The government denied any obligation to produce the tapes other than the one about which Crake had testified on direct examination, and stated that they contained no material helpful to the defense (Tr. 173). The district court decided that the government was not required to produce the tapes and refused to listen to them (Tr. 178, 180, 1278).

On appeal, the Second Circuit concluded that the tapes were discoverable by the defendant whose voice was recorded thereon as "statement," as that term is used in Rule 16(a) of the Federal Rules of Criminal Procedure. After having examined transcripts of the tapes *in camera,* however, the court was convinced that error in failing to turn over the tapes was harmless (Pet. App. 10a–18a).

## ARGUMENT

Relying upon *Alderman* v. *United States,* 394 U.S. 165, petitioners Crisona and Parks challenge the court of appeals' *in camera* inspection of the transcript of Crake's tapes of his telephone conversations with them and its ruling that their non-disclosure was harmless error. They contend that their mate-

riality could be determined only by the defense. However, the tapes relate only to one loan; as to that loan, they reveal only conversations with Crake over a three day period in January, after the advance fee on that one loan had been paid; the government was not implicated in the taping. Thus, the court below could properly deem the error harmless, having examined the tapes. *Alderman* involved government electronic surveillance, assumed to be in violation of the Fourth Amendment. In that context, the defendants would be entitled to the exclusion from evidence of any "fruits" of the illegality; to develop the possibility that such fruits had been harvested, this Court deemed an adversary examination of the transcripts required. Here, on the other hand, no question is raised of exclusion of this or other evidence; the issue is whether the defense was prejudicially deprived of important information about the government's case—favorable (Rule 16(a)) or unfavorable (*Brady* v. *Maryland*)—which it was entitled to inspect. To determine *this* issue, "the trial judge had only to place the transcript or other record of the surveillance alongside the record evidence and compare the two." *Alderman, supra,* 394 U.S. at 182. Thus in the present case the court of appeals could see for itself that production of the recordings would not have affected the cases.[5]

[5] The transcripts of the tape recordings disclose that most of Parks' conversations consisted of relaying messages. The cross-examination of Parks to which his petition refers (Tr. 2350–2351) was merely as to whether he had objected to a late hour telephone call from Brown. As to Crisona, the transcripts not turned over contain no information beyond that contained in the one played to the jury.

2. During the government's case, counsel for John De Lyra asked the trial judge for an advance ruling on whether the government could raise prior convictions for impeachment purposes if petitioner John De Lyra took the stand in his own behalf.[6] The trial judge wanted to consider this request in light of *United States* v. *Palumbo,* 401 F. 2d 270 (C.A. 2), certiorari denied, 394 U.S. 947 (Tr. 1326–1328).[7] The trial judge subsequently refused to make an anticipatory ruling (Tr. 1597–1598). As the court of appeals noted, defendants are not automatically entitled to rulings on the admissibility of impeachment evidence prior to ~~their~~ its introduction. The reason for this procedure is that the admissibility necessarily depends upon what is adduced on the direct examination. In this case, petitioner De Lyra has not shown that the trial judge's decision not to give him an advance ruling on the admissibility of testimony tending to impeach his credibility was an abuse of discretion. Indeed, petitioner has never indicated what his testimony would have been or how it would have been affected by the introduction of prior convictions (Pet. App. 20a–21a). See also *United States* v. *Hart,* 407

[6] John De Lyra had been convicted of vagrancy and petit larceny in 1935 and he was later charged with concealment of leased property which resulted in a fine of $300 (Pet. App. 20a–21a).

[7] In *Palumbo* the court affirmed the proposition that a judge has discretion in ruling on the admission of prior convictions and "must balance all relevant factors to determine whether its probative value is outweighed by its prejudicial effect" (401 F. 2d at p. 273). The judge also has discretion to decide whether an advance ruling is warranted.

F. 2d 1087 (C.A. 2), certiorari denied, 395 U.S. 916; *United States* v. *Sternback*, 402 F. 2d 353 (C.A. 7), certiorari denied, 393 U.S. 1082.

## CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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